79-1132

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1979

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation,

Appellant,

vs.

THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE ADMINISTRATOR OF THE LABOR STANDARDS DIVISION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; RAE S. BAUER; COMMUNICATIONS WORKERS OF AMERICA, a Labor Union; and THE MONTANA HUMAN RIGHTS COMMISSION, an Agency of the State of Montana,

Appellees.

JURISDICTIONAL STATEMENT

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

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ATTORNEY FOR APPELLANT

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Appellees.	)

JURISDICTIONAL STATEMENT

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

The Appellant, The Mountain States Telephone and Telegraph Company, hereinafter "Mountain Bell," respectfully submits the following Jurisdictional Statement in its Appeal from the Judgment of the Supreme Court of the State of Montana dated October 22, 1979.

OPINIONS

The opinion of the Montana Supreme Court is, as yet, unreported. It is set out in Appendix A-1. The Findings of Fact and Conclusions of Law of the Commissioner of Labor and Industry of the State of Montana and the Opinion and Judgment of the District Court of the First Judicial District of the State of Montana in and for Lewis and Clark County are unreported. They are set out at Appendix C-1 and B-1, respectively.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The Nature of the Proceeding.

The case began as an administrative action before the Commissioner of Labor and Industry of the State of Montana in which an employee named Rae S. Bauer, hereinafter "Bauer," sought to enforce the provisions of the "Montana Maternity Leave Act," §39-7-201, *et seq.* (M.C.A. 1978), against Mountain Bell. The "Montana Maternity Leave Act" provides, in pertinent part, that it is an unlawful employment act for an employer to deny to any employee "who is disabled as the result of pregnancy any compensation to which she is entitled . . . pursuant to plans maintained by her employer. . . ." Section 39-7-203(3) (M.C.A. 1978). The Montana statute is set out at length at Appendix D-1.

Mountain Bell contended that the Montana law was inapplicable to it on two grounds: (1) That it was preempted by the provisions of §514(a) of the Employee Retirement Income Security Act of 1974, 29 USC §1144(a), hereinafter "ERISA," which provides that ERISA's provisions "shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." Applicable

ERISA provisions are set out at length in Appendix D-2; and (2) that the Collective Bargaining Agreement between Mountain Bell and the Union representing Bauer provided for an "employees benefit plan" which did not pay "sickness benefits" for a normal pregnancy, but only for an abnormal pregnancy or complications thereof. Since the contract was negotiated in accordance with the requirements of the National Labor Relations Act, as amended, 29 USC §141, *et seq.*, hereinafter "Labor Act," Montana's unilateral modification of this contract provision was preempted by the supremacy clause of the UNITED STATES CONSTITUTION, Article VI, Clause 2. These arguments were rejected at the administrative level but upheld by the intermediate state court. On appeal, both of these arguments were ultimately rejected by the Montana Supreme Court which upheld the "Montana Maternity Leave Act," *supra*, as against the argument that it was repugnant to the Constitution and laws of the United States.

2. The Judgment Sought to be Reviewed.

The judgment was entered by the Montana Supreme Court on October 22, 1979. Mountain Bell filed a Notice of Appeal from this decision on December 19, 1979. A copy of that Notice of Appeal and the Certificate of Mailing to all other parties is Exhibit E to the Appendix.

3. Jurisdiction of this Court.

The statutory provision which is believed to confer jurisdiction on this Court is 28 USC §1257(2).

4. Cases Sustaining Jurisdiction.

Cases believed to sustain jurisdiction in this matter include *Cohen v. California*, 403 U.S. 15 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board*, 336 U.S. 18 (1949); and *Bethelehem Steel Company v. New York State Labor Relations Board*, 330 U.S. 767 (1947).

GENERAL NATURE OF THE APPEAL

The appeal involves the constitutionality of the "Montana Maternity Leave Act," *supra*, as it pertains to employers in interstate commerce who have negotiated "employee benefit plans" with Unions under the "Labor Act," *supra*, which plans are in accord with the requirements of "ERISA," *supra*.

QUESTIONS PRESENTED BY THE APPEAL

1. Whether the Employee Retirement Income Security Act preempts application of the "Montana Maternity Leave Act" to Mountain Bell because it impermissibly interferes with the operation of Mountain Bell's federally-regulated employee benefit plan.

2. Whether the supremacy clause of the United States Constitution preempts application of the "Montana Maternity Leave Act" to Mountain Bell because it impermissibly interferes with the substantive terms of a Collective Bargaining Agreement entered into under the auspices of the National Labor Relations Act, as amended.

STATEMENT OF THE CASE

The case was initiated by a Complaint filed with the Montana Commissioner of Labor and Industry by a Mountain Bell employee named Bauer, alleging a violation of the "Montana Maternity Leave Act," §41-2602(1)(c) (M.C.A. 1947).[1] That section provides in relevant part that it is

[1] Section 41-2602(1)(c) of the 1947 statutes was recodified as Section 39-7-203(3) (M.C.A. 1978). The later statutory citation is used in the decision of the Montana Supreme Court and is set forth in Appendix D-1. For sake of uniformity, in the remainder of this Jurisdictional Statement we will refer to the 1978 statutory codification.

unlawful for an employer "to deny to the employee, who is disabled as the result of pregnancy, . . . benefits accrued pursuant to plans maintained by her employer. . . ." The violation allegedly resulted from Mountain Bell's failure to pay sickness-disability benefits for temporary disability claimed to have been suffered by Bauer as the result of a pregnancy, child birth and recovery therefrom.

At the Commission level, Mountain Bell argued that the "Montana Maternity Leave Act," *supra*, was preempted because it interfered with the terms of a labor contract bargained in accordance with the requirements of the National Labor Relations Act, as amended, 29 USC §141, *et seq.*, and because it was expressly preempted by §514(a) of the Employee Retirement Income Security Act of 1974, 29 USC §1144(a). The case was tried before the Commission in large part on a stipulated statement of facts which were adopted by the Commission and which have subsequently been readopted by the Montana District Court and the Montana Supreme Court. These facts may be summarized as follows:

Mountain Bell is a Colorado corporation authorized to do and doing business as a telephone common carrier in a number of states, including Montana. Mountain Bell is, thus, an employer engaged in commerce or in an industry affecting commerce within the meanings of §§3(12) and 4(a) of ERISA, 29 USC §§1002(12) and 1003(a) [Commissioner's Finding of Fact No. 4; Appendix C-3, Page C-3].

Bauer was a member of the multi-state collective bargaining unit represented by Communications Workers of America, and as such was covered by the same Collective Bargaining Agreement applicable to Mountain Bell employees in that multi-state area. As such, she was covered by Mountain Bell's Plan for Employees' Pensions, Disability Benefits and Death Benefits which is an "employee benefit plan" within the meaning of §3(3) of ERISA, 29 USC §1002(3). This contract was entered into under and subject to the National Labor Relations Act, as amended. She did not receive any sickness-disability benefits in connection with a pregnancy and child birth because such coverage has traditionally been denied

under the benefit plan and the Collective Bargaining Agreement provides only that female employees may be granted maternity leaves of absence for periods not to exceed one year, but that during that period of time they are not eligible for sickness-disability benefits [Commissioner's Finding of Fact No. 4; Appendix C-3, Page C-3].

On April 22, 1976, a hearing was held before a Hearing Examiner specifically appointed by the Commission to determine Mountain Bell's contentions that federal preemption under either ERISA or federal labor law prevented the enforcement of the Montana Maternity Leave Act [Commissioner's Finding of Fact No. 2; Appendix C-3, Page C-2]. The Hearing Examiner entered an intermediate order concluding that there were serious preemption problems posed by application of the "Montana Maternity Leave Act" to an interstate employer, such as Mountain Bell, but that the case regarding the specific employee should proceed to hearing on the merits because there was a possibility that the preemption problems could be avoided if the Act were construed not to encompass absences "necessitated by normal child birth." As a result, the matter was set for hearing on the merits of the employee's Complaint. The Hearing Examiner determined that the employee's pregnancy had been in all respects normal and concluded that the "Montana Maternity Leave Act" was not intended to compensate such circumstances and, thus, dismissed the Complaint. On October 12, 1977, the Commissioner of Labor rejected the decisions of both the Hearing Examiners and rejected Mountain Bell's preemption arguments [Commissioner's Findings and Conclusions at Page 25; Appendix C-3, Page C-25].

Mountain Bell then filed a Petition for Judicial Review and a Complaint for Declaratory Judgment that the Commissioner's Order requiring the payment of sickness-disability benefits was preempted by the express terms of ERISA, *supra*, and was unconstitutional under the supremacy clause, UNITED STATES CONSTITUTION, Article VI, Clause 2, because state regulation of the substantive terms of the Collective Bargaining Agreement between Mountain Bell and CWA was preempted by federal labor law.

The District Judge thereafter issued an Opinion in which he held that the "Montana Maternity Leave Act," *supra*, could not be enforced against Mountain Bell because of preemption under ERISA. The Judge declined to decide whether there was also preemption under federal labor law, noting that "consideration of whether federal labor law preempts the Maternity Leave Act by implication is unnecessary in view of the much clearer preemptive declaration of ERISA" [District Court Opinion, Page 11; Appendix B, Page B-13].

An appeal was taken by the charging party and the several governmental Defendants to the Supreme Court of the State of Montana.

The Montana Supreme Court issued its Opinion October 22, 1979, and determined that the "Montana Maternity Leave Act" was not preempted.

The Montana Supreme Court stated that the issue presented to it for review was "does either the Employee Retirement Income Security Act of 1974, 29 USC §1001, *et seq.*, or the Labor Management Relations Act of 1947, as amended, 29 USC §141, *et seq.*, preempt the application of §39-7-203(3) (MCA) of the Montana Maternity Leave Act to Respondent/Cross-Appellant, The Mountain States Telephone and Telegraph Company" [Montana Supreme Court Opinion, Page 4; Appendix A, Page A-3].

The Court observed that the governmental Appellants raised the "double savings clause" argument that the:

> Montana statute is exempted from ERISA preemption by 29 USC §1144(d), which declares, "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supercede any law of the United States. . . .", in conjunction with 42 USC §2000e-7 (Section 708 in Title VII, PL 88-352, Civil Rights Act of 1964, 78 Stat. 262), which provides, "[n]othing in this subchapter shall be deemed to exempt or relieve any

person from any liability, duty, penalty, or punishment provided by any present or future law of any state. . . ." Appellants argue that to allow preemption of the Montana Maternity Leave Act by subsection (a) of 29 USC §1144 would be to violate subsection (d) of that statute by impairing the law of the United States (the 1964 Civil Rights Act) by relieving Mountain Bell from its liability under the Montana Act [Montana Supreme Court Opinion, Page 7; Appendix A, Page A-6 & 7].

The Court then reviewed the cases pro and con on the question of ERISA preemption and observed that the non-preemption viewpoint seems to be favored by the majority of the cases but that "all the cases, however, rely on some, albeit varied, interpretation of how Title VII, ERISA, *General Electric v. Gilbert, supra,* and state laws interact" [Montana Supreme Court Opinion, Page 16; Appendix A, Page A-15]. The Court then concludes that the legislative history of Title VII of the Civil Rights Act of 1964, 42 USC §2000e, *et seq.*, indicates that Congress did in fact intend to protect against sex discrimination in employment. This fact, coupled with the consideration that the Equal Employment Opportunity Commission Guideline overturned in *General Electric v. Gilbert,* 429 U.S. 125 (1976) was still in effect when ERISA was being considered, indicated that Congress did not intend to preempt employment discrimination acts which tangentially affect employee benefit plans for the reason that it "had already attempted to do so under Title VII" [Montana Supreme Court Opinion, Page 19; Appendix A, Page A-20].

Having determined that the intent of Congress was to outlaw sex discrimination, the Court observed that the question of whether a state statute is invalid under the supremacy clause depends upon the intent of Congress. The Court then observed:

> There is nothing in ERISA which treats the area of employment discrimination. The problem arises because we are dealing with two statutes – one state and one federal – that seek to regulate

> separate activities although some overlapping areas exist between them. While ERISA supercedes state laws relating to employee benefit plans, it does not expressly supercede all state fair employment laws, nor does it mention them. Indeed, given the history of Title VII, it would have been illogical if it had.
>
> * * * *
>
> To hold for preemption would be to create an enormous vacuum in areas that have heretofore been traditionally dealt with by the states through the liberal intent of Title VII. The substantive nature of health and welfare benefits are not addressed by ERISA. We should not presume congressional intent to preempt unless Congress "has unmistakably so ordained." *Florida Lime and Avocado Growers, Inc. v. Paul, supra,* 373 U.S. at 142." [Montana Supreme Court Opinion, Page 21; Appendix A, Page A-22].

Having determined that there was no ERISA preemption, the Montana Supreme Court then turned to the question of preemption under the National Labor Relations Act, as amended, *supra.* The Court initially observed that the District Court had declined to rule on the issue and thus, although the issue is "technically not before us . . . in view of our discussion concerning ERISA, it becomes necessary to discuss this issue as well" [Montana Supreme Court Opinion, Page 22; Appendix A, Page A-23]. After observing that the employment relationship between Mountain Bell and Bauer was governed by a Collective Bargaining Agreement, the Court observed that federal law does not specify the substantive terms but only requires that employers and unions bargain good faith agreements to control their industrial relations. While agreeing that employee benefit plans constitute a mandatory topic of bargaining, and recognizing that under the resulting contract Mountain Bell is not required to pay disability benefits pursuant to an otherwise normal pregnancy, the Court nonetheless rejected the argument that the "Montana Maternity Leave Act" altered the Collective Bargaining Agreement in an impermissible manner.

The Court's basic rationale was that preemption is not to be inferred where the regulated subject matter is deeply and inherently rooted in local feeling and responsibility and the matter is only of peripheral concern to the federal law, but that preemption should, instead, apply only where there is a clear reason to fear that one forum, either state or federal, would enjoin as illegal conduct which the other would find legal or where the application of the state law by the state courts would restrict the exercise of rights guaranteed by the federal acts. With respect to the former test, the Court determined that the "Montana Maternity Leave Act," *supra,* dealt with an area of traditional local concern which only peripherally affects the collective bargaining process. With respect to the subsequent tests, the Court apparently determines that Title VII, *supra,* affirmatively protects and encourages state anti-employment discrimination legislation and, thus, "the rights accorded under §39-7-203, M.C.A., are uniquely personal and may not be waived through the collective bargaining process, *Alexander v. Gardner-Denver, supra.* . . . We therefore conclude that §39-7-203, MCA, is not preempted by the National Labor Relations Act" [Montana Supreme Court Decision, Pages 27-28; Appendix A, Page A-28].

SUBSTANTIALITY OF FEDERAL QUESTIONS

Summarized, the Montana Supreme Court has held that Montana may substantively regulate employee benefit plans regardless of the all-encompassing scope and clearly expressed intent to occupy the field shown by Congress' adoption of ERISA, *supra.* It has also held that Montana may substantively modify contract provisions which are mandatory topics of bargaining under the National Labor Relations Act, as amended, *supra,* even when the provisions are in a multi-state contract. The Montana Supreme Court's Decision clearly raises the question of whether §514(a) of ERISA, 29 USC §1144(a), is to be interpreted to allow a state to regulate the substantive provisions of employee benefit plans. The decision further raises the question of how broadly, if at all, a state may substantively decree the modification of agreements bargained under the National Labor Relations Act, as

amended, *supra.* These significant issues of federal/state relations in the areas of collective bargaining and the regulation of employee benefit and pension plans should, we feel, be decided by this Court.

We have here the classic confrontation between the federal government's preeminent authority over interstate commerce and the zealously guarded state police power to insure the health, safety and welfare of its citizens. It is so well understood as to require no citation of authority that the states may not, under the guise of police powers, substantially impede the free flow of commerce or regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority. The need for single and centralized regulation must be assumed where Congress has acted to occupy the field.

Thus, federal action on the subject of employee benefit plans in itself evidences an intent by Congress to preempt all state action directed to the same subject, whether that state action merely duplicates federal action, whether that state action is more specific than that federal action, or whether that state action attempts to go further than the federal action. This pervasive and comprehensive scope of federal involvement over all imaginable aspects of employee benefit plans satisfies the most commonly used standard employed to find federal preemption.

However, the drafters of ERISA went further and expressed their intent to provide for the uniform and comprehensive regulation of employee benefit plans on a nationwide basis without state intervention. Section 514(a) ERISA, 29 USC §1144(a); see also, 29 USC §1001(a); S. Rep. No. 93-127, 3 U.S.C.C. & A.N. 4838, 4871 (93rd Cong., 2d Sess. 1974). Any attempt by a state to frustrate this expressed federal purpose of uniformity should be struck down. As this Court held in *Perez v. Campbell,* 402 U.S. 637, 651-52 (1971):

> We can no longer adhere to the aberational doctrine . . . that state law may frustrate the operation of

> federal law as long as the state legislature in passing its law had some purpose in mind other than want of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our supremacy clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy – other than frustration of the federal objective – that would be tangentially furthered by the proposed state law.

This Court observed in *Amalgamated Association of Street, Electric Railway and Motorcoach Employees v. Lockridge*, 403 U.S. 278 (1971), *rehearing denied*, 404 U.S. 874 (1972), that:

> The principle of preemption that informs our general labor law was born of this court's efforts . . . to preclude, so far as reasonably possible, conflicts between the exertion of judicial and administrative power in the attainment of the multi-faceted policies underlying the federal scheme. *Id.* at 286.

The "Montana Maternity Leave Act," *supra*, not only substantively regulates benefit plans, but procedurally it creates a multiplicity of tribunals to consider claims on the subject matter upon which Congress has already acted. This resulting procedural multiplicity frustrates the stated object of federal uniformity every bit as much as the state substantive law on the same subject matter. Procedural and substantive duplication by Montana of the federal regulatory scheme on the subject of employee benefit plans is precisely the result of the Montana decision, however. A substantial federal question is presented as to whether such a result can constitutionally be sustained in light of the stated intent of Congress to provide uniformity in administration and regulation of employee benefit plans, which is found in §514(a) of ERISA, 29 USC §1144(a).

Where Congress has chosen to exercise its commerce authority as clearly and as expressly as it did in ERISA, *supra*, the only conflicts between that federal act and state action must be those specifically sanctioned by Congress. Congress clearly knows how to provide states with such authority when it is appropriate. See, *e.g.*, §14(b), National Labor Relations Act, as amended, 29 USC §167(b). Had Congress wished to provide an island of state authority in this broad sea of federal employee benefit plan preemption, it could have done so. It chose not to. It chose instead to seize upon the strongest possible language to preempt local law. Indeed, Congress saw fit in §514(c), 29 USC §1144(c), to define the term "state law" in a way which goes well beyond traditional definitions to exclude application by any instrumentality "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." Clearly, the question of whether Montana should be entitled to legislate in the face of this clear mandate is a substantial one.

The Montana Supreme Court clearly appreciated the problem when it attempted to seize upon the circuitous "double savings clause" argument that preemption of the "Montana Maternity Leave Act," *supra*, would interfere with the provisions of Title VII of the Civil Rights Act of 1964, 42 USC §2000e, *et seq.* The Court's assumptions are that Congress by its adoption of Title VII intended the states to legislate with impunity so long as they did so in the name of eradicating invidious discrimination and that any limitation upon that state legislative prerogative would interfere with Title VII thereby violating the ERISA "savings clause." This ignores two things. First, the savings clause in §514(d) of ERISA, 29 USC §1144(d), saves the federal act – not the state act. Further, the legislative history of Title VII of the Civil Rights Act does not support the construction given to it by the Montana Court. Statements by the drafters of ERISA have, on numerous occasions, specifically rejected the idea that ERISA provided this "loophole." In discussing the impact of ERISA on state age discrimination statutes, Senators Williams and Javits concluded that state statutes would be specifically preempted. The Senators stated:

Mr. Javits: Finally, Mr. President, it is understood that just as these age discrimination amendments do not interfere with ERISA, state age discrimination and employment laws also are not to interfere with ERISA. The ADEA itself, as pointed out in the Senate Report, does not preempt such state age discrimination laws. However, there should be no question that the preemption rules of §514(a) of ERISA shall be determinative regarding the preemption of state age discrimination laws which directly or indirectly establish requirements relating to employee benefit plans. ERISA preemption of state age discrimination laws shall be determined without regard to §514(d) of ERISA or the fact that the ADEA does not itself preempt state law.

Mr. Williams: I concur in my friend's observations as they accurately state the controlling principles of law in this regard. Federal law will preempt state age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in §4(a) of ERISA and are not exempt under §4(b) of ERISA.

124 Congressional Record, §4451 (Daily Edition, March 23, 1978, as corrected, 124 Congressional Record, §4767 (Daily Edition, April 4, 1978).

It takes but little imagination to conjure up numerous examples of totally unworkable situations which would result from states being able to act with impunity in the name of

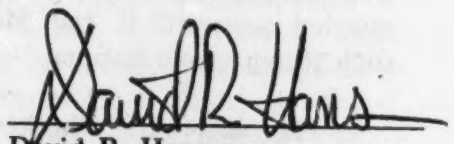
eradicating invidious discrimination. For example, the Securities and Exchange Commission clearly feels that full disclosure to prospective purchasers of investment securities requires disclosure of beneficial stock ownership by spouses of corporate officers and directors. Could a state override this obvious federal interest by passing legislation precluding public disclosure of anyone's marital status on grounds that the information could be used to discriminate against unmarried women? If the Montana logic is allowed to stand, such things could happen.

The issue of whether states may regulate employee benefit plans in the face of the clear mandate of §514(a) of ERISA, *supra*, has led to a split of authority in the federal courts. On one side, a statute of the state of Wisconsin, very similar to the "Montana Maternity Leave Act," was upheld against the argument that it was preempted by ERISA. This determination followed the "double savings clause" approach adopted by the Montana Supreme Court. *Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations of the State of Wisconsin, et al.*, 453 F.2d 205 (7th Cir. 1979). That decision is in direct conflict with *Pervel Industries, Inc. v. State of Connecticut Commission on Human Rights and Opportunities*, 468 F.Supp. 490, 603 F.2d 214 (2d Cir. 1979), in which it was held that ERISA does preempt state efforts to apply anti-discrimination laws to employee benefit plans. A related decision upholding ERISA preemption and rejecting the "double savings clause" contention is *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir. 1978).See also, *Azzaro v. Harnett*, 414 F.Supp. 473 (S.D. N.Y. 1976), *aff'd.*, 553 F.2d 93 (2d Cir. 1977), *cert. denied*, 434 U.S. 824 (1977). It is of the utmost importance that this Court decide which approach is to prevail, and eliminate this split of authority in the federal courts.

CONCLUSION

Mountain Bell respectfully requests the Court to note probable jurisdiction over this appeal and the issues presented herein and to Order plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that I have mailed three true and correct copies of the foregoing JURISDICTIONAL STATEMENT and the attendant APPENDIX by depositing the same in the United States mail, first class postage prepaid, this 18th day of JANUARY, 1980, addressed as follows:

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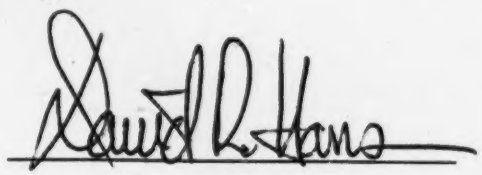

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No. 14557

IN THE SUPREME COURT OF THE STATE OF MONTANA

1979

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado Corporation,

Plaintiff and Respondent,

— vs —

THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA et al.,

Defendants and Appellants.

Appeal from: District Court of the First Judicial District, Honorable Gordon R. Bennett, Judge presiding.

Counsel of Record:

For Appellants:
Rosemary B. Zion argued, Helena, Montana
Clay Smith argued, Denver, Colorado
James Gardner, Helena, Montana

For Respondent:
Hughes, Bennett and Cain, Helena, Montana
John F. Sullivan argued, Helena, Montana

Submitted: September 19, 1979
Decided: Oct. 22, 1979

Filed:

/s/ Thomas J. Kearney
Clerk

Mr. Justice Gene B. Daly delivered the Opinion of the Court.

This litigation originated as an administrative proceeding in the state Department of Labor and Industry. The decision of the administrative hearing was adverse to Mountain States Telephone and Telegraph Company (hereinafter "Mountain Bell") and judicial review and declaratory relief were sought. The District Court of the First Judicial District, Lewis and Clark County, entered judgment for Mountain Bell remanding the parties to the administrative level where the original proceeding could be dismissed. Appellants appeal from that judgment, and Mountain Bell, as respondent, cross-appeals from certain dicta included in the District Court opinion.

Mountain Bell is a Colorado corporation engaged in interstate commerce throughout the Rocky Mountain west, including Montana. It is a signatory to a collective bargaining agreement with the Communication Workers of America (CWA), a labor union. This agreement provides that an employee may request up to one year's maternity leave but may receive no benefits during pregnancy except death benefits.

Rae Bauer, a member of CWA, was an operator for Mountain Bell in Great Falls, Montana, and had been so employed since 1973. She became pregnant in the spring of 1975. Because of a past history of gynecological problems and on the advice of her doctor, she began a leave of absence on October 15, 1975. She gave birth on January 20, 1976, but did not return to work until October 11, 1976.

Under the Mountain Bell disability benefits plan, she was clearly ineligible for compensation for the pregnancy leave taken. The company traditionally denied disability benefits for pregnancy-related conditions.

On February 11, 1976, Rae Bauer filed a complaint under the Maternity Leave Act of the State of Montana, section 41-2601 et. seq., R.C.M. 1947, now section 39-7-201 et seq., MCA, alleging that she was entitled to certain maternity leave benefits. After an administrative hearing, it

was found that the Department of Labor and Industry had jurisdiction over the matter. As a result of a second administrative hearing, the claim for benefits was dismissed. All parties excepted to the result of this hearing. The commissioner issued a decision which, in effect, said the Maternity Leave Act governed the situation and that benefits were payable. In so holding, the commissioner rejected Mountain Bell's argument that either the federal Employee Retirement Income Security Act of 1974 (ERISA) or the Labor Management Relation Act of 1947, as amended (LMRA), preempted the state law. Further, under the state act, the phrase "disabled as a result of pregnancy" meant all disabilities related to pregnancy and that pregnancy meant both pre- and post-childbirth conditions. The next day, the commissioner adopted the decision as part of the department's administrative rules.

Mountain Bell subsequently sought judicial review of the decision as well as to have the rules of the department declared invalid. On August 17, 1978, the District Court concluded that the federal laws did preempt the operation of the state law and that the state law was unenforceable against Mountain Bell. From that portion of the court's ruling, appellants appeal. By way of dicta, the District Court opinion said, for intrastate enterprises, the state law required that benefits be paid for all pregnancy-related occurrences, whether normal or abnormal, and that the statute applied from the beginning of disability through the termination of gestation and for a reasonable time afterwards. From this portion of the opinion, Mountain Bell cross-appeals.

The following issues have been presented to this Court for review:

1. Does either the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq., or the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §141 et seq., preempt the application of section 39-7-203(3), MCA, of the Montana Maternity Leave Act to respondent/cross-appellant, the Mountain States Telephone and Telegraph Company?

2. Whether the above Montana statute must be construed to confer benefits for normal and abnormal pregnancy disabilities and to pre- and post-childbirth conditions?

Appellants/cross-respondents' position can be summarized as follows:

(1) The Montana Maternity Leave Act is not preempted by the Employee Retirement Income Security Act or by federal labor laws.

(2) Congress did not intend to legislate within ERISA on employment discrimination. Regulation of this field was left subject to Title VII of the Civil Rights Act of 1964. ERISA does not affect the operation of Title VII.

(3) Title VII is based upon a model of state and federal cooperation. It provides for deferral to state anti-discrimination agencies of Title VII complaints and protects state laws which do not conflict with Title VII from preemption by that Act.

(4) These provisions are part of a congressional purpose to encourage the development of state anti-discrimination laws. This purpose, which is essential to Title VII, would be impaired if ERISA were held to prohibit states from enacting anti-discrimination laws such as the Maternity Leave Act.

(5) Title VII affirmatively protects state anti-discrimination laws from preemption. Operation of local laws is an integral part of legislative scheme of Title VII.

(6) The United States Supreme Court has refused to find preemption in areas where Congress has intended to foster cooperation.

(7) The recent enactment of the Pregnancy Disability Act, a law amending Title VII, specifically overturned General Electric Co. v. Gilbert (1976), 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343, and made it clear that Congress did not preempt state pregnancy disability laws by enacting ERISA.

(8) Federal labor laws do not preempt the Montana Maternity Leave Act. Applying a balancing test, the interest of the state in providing economic protection to its women workers clearly outweighs any implied incursions into the territory occupied by NLRA/LMRA.

(9) Title VII also protects the Montana statute from preemption by federal labor law.

(10) The statutory protection afforded by Title VII and the Montana Maternity Leave Act are in the nature of an independent right and cannot be waived through collective bargaining.

(11) There is a presumption in favor of the validity of state statutes which deal with an area of traditional state concern.

(12) The Montana Maternity Leave Act clearly applies to all periods of disability occurring as a result of pregnancy, whether these periods of disability are normal or unusual, and regardless of whether they occur before or after childbirth.

Respondent/cross-appellant takes a generally contrary position.

The Equal Employment Opportunity Commission, appearing by amicus brief, argues that state fair employment laws such as section 39-7-201 et seq., MCA, are not preempted by ERISA for the reasons stated in Bucyrus-Erie Corp. v. Department of Industry, Etc. (7th Cir. 1979), 599 F.2d 205, and for the reasons stated in the briefs of appellants/cross-respondents.

ERISA PREEMPTION OF THE MONTANA ACT

The first issue facing this Court is whether Section 39-7-203(3), MCA, is preempted by the Employee Retirement Income Security Act (ERISA, P.L. 93-406, 88 Stat. 897, enacted September 2, 1974, and in particular §514 thereof, codified as 29 U.S.C. §1144 and referred to herein as §1144).

Section 39-7-203(3), MCA, of the Montana Maternity Leave Act, provides in pertinent part:

> "It shall be unlawful for an employer or his agent to:
>
> ". . .
>
> "(3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer . ."

The preemption provision of ERISA, 29 U.S.C. §1144(a), provides in pertinent part:

> "(a) except as provided in subsection (b) of this section, the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title . . ."

29 U.S.C. §1003(a) makes the above section applicable to any benefit plan established or maintained by any employer engaged in interstate commerce. There is no dispute that Mountain Bell is engaged in interstate commerce nor is there any dispute that Mountain Bell's employee benefit plan is covered by ERISA.

Mountain Bell argues, and the District Court held, that the federal government has clearly and unambiguously occupied the field with respect to employee health and welfare benefits and has preempted the states from in any way regulating such benefits other than by the specific exemptions provided in 29 U.S.C. §1144(b), exemptions which admittedly do not apply here.

Appellants do not agree. They contend that the Montana statute is exempted from ERISA preemption by 29 U.S.C. §1144(d), which declares, "[n]othing in this subchapter shall

be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . .", in conjunction with 42 U.S.C. §2000e-7 (section 708 in Title VII, P.L. 88-352, Civil Rights Act of 1964, 78 Stat. 262), which provides, "[n]othing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State . . ." Appellants argue that to allow preemption of the Montana Maternity Leave Act by subsection (a) of 29 U.S.C. §1144 would be to violate subsection (d) of that statute by impairing a law of the United States (the 1964 Civil Rights Act) by relieving Mountain Bell from its liability under the Montana Act.

Appellants further contend that by permitting ERISA preemption, two other sections of the Civil Rights Act would be impaired. They are 42 U.S.C. §2000e-5(c) (section 706, Title VII, P.L. 88-352, 78 Stat. 259, which provides for deferral of federal action in equal employment opportunity cases for a period of sixty days to permit the commencement of proceedings under state law) and 42 U.S.C. §2000h-4 (section 1104, Title XI, 78 Stat. 268, which provides: "[n]othing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act or any provision thereof").

In effect, appellants argue that if the Montana Act is preempted, the above sections of the Civil Rights Act will be delimited.

Although appellants' arguments found little solace in the District Court's opinion, similar arguments have found support in other jurisdictions: Goodyear Tire & Rubber v. Dept. of Industry (1978), 87 Wis.2d 56, 273 N.W.2d 786; Bucyrus-Erie Co. v. Dept. of Industry (E.D. Wisc. 1978), 453 F.Supp. 75, Aff'd, (7th Cir. 1979), 599 F.2d 205; Illinois Bell Tel. Co. v.

Fair Employment Practices Commission (1979), 68 Ill.App.3d 829, 25 Ill.Dec. 328, 386 N.E.2d 599; Westinghouse Elec. Corp. v. State Human Rights Appeals Board (1978), 60 A.D.2d 943, 401 N.Y.S.2d 597; Liberty Mutual Insurance Company v. State Division of Human Rights (1978), 61 A.D.2d 822, 402 N.Y.S.2d 218; Lukus v. Westinghouse Electric Corp., No. GD77-14803 (Ct. of Common Pleas for Allegheny County, Pa., April 20, 1978 (unpublished opinion); Time Insurance Co. v. Department of Industry, Labor and Human Relations, No. 145-423, (Ct. of Dane County, Wisc., January 3, 1978), 16 BNA FEP 391.

Although not dealing with facts similar to the instant case, a number of courts have interpreted the preemption provision in its "broadest sense." See Wadsworth v. Whaland (1st Cir. 1977), 562 F.2d 70; Standard Oil Co. of California v. Agsalud (N.D. Cal. 1977), 442 F.Supp. 695, 706-07; Bell v. Employee Security Benefit Ass'n (D. Kan. 1977), 437 F.Supp. 382, 385-88; Wayne Chemical v. Columbus Agency Service Corp. (N.D. Ind. 1977), 426 F.Supp. 316, 321, aff'd as modified, (7th Cir. 1977), 567 F.2d 692; Hewlett-Packard Co. v. Barnes (N.D. Cal. 1977), 425 F.Supp. 1294, aff'd, (9th Cir. 1978), 571 F.2d 502; Azzaro v. Harnett (S.D. N.Y. 1976), 414 F.Supp. 473, 474, aff'd, (2nd Cir. 1977), 553 F.2d 93, cert. denied, (1977), 434 U.S. 824, 98 S.Ct. 71, 54 L.Ed.2d 82; National Carriers Conf. Com. v. Heffernan (D. Conn. 1978), 454 F.Supp. 914, 918; Francis v. United Technologies Corp. (N.D. Cal. 1978), 458 F.Supp. 84. But see, Insurers Action Council, Inc. v. Heaton (D. Minn. 1976), 423 F.Supp. 921, 926.

It is interesting to note that although *Wadsworth* and *Bell* favored broad preemption by ERISA, they both held that the individual statutes before them were spared from exemption, albeit by the specific ERISA provision sparing state laws regulating insurance from preemption. Further, *Wayne Chemical*, while finding preemption, incorporated the state statute in question into the federal common law of employee benefit plans. *Hewlett-Packard* and *Azzaro*, on the other hand, found broad preemption. The state laws in these two cases, however, concerned areas regulated by ERISA.

There are a number of cases on point where a state law prohibiting discrimination in the provision of disability benefits to pregnant workers is involved. While there is a split of authority, the majority of opinions to date have found no federal preemption of the state law. Gast v. State, by and through Stevenson (1978), 36 Or.App. 441, 585 P.2d 12; Goodyear Tire & Rubber v. Dept. of Industry, supra; Bucyrus-Erie Co. v. Dept. of Industry, supra; Illinois Bell Tel. Co. v. Fair Employment Practices Commission, supra; Westinghouse Elec. Corp. v. State Human Rights Appeals Board, supra; Liberty Mutual Insurance Co. v. State Division of Human Rights, supra; Lukus v. Westinghouse Electric Corp., supra; Time Insurance Co. v. DILHR, supra. *Contra,* State of Minnesota v. MMM Co., Department of Human Rights Decision, Minn., September 16, 1977; Pervel Industries v. State of Conn. (D. Conn. 1978), 468 F.Supp. 490; American Chain and Cable Co., Inc. v. Iowa Civil Rights Commission, CE 6-2938 (Polk District County Ct., Iowa, June 28, 1978) (unpublished opinion).

Several of the above decisions have adopted the view taken by appellants herein – that Title VII protects state statutes from preemption by ERISA.

The Federal District Court in *Bucyrus-Erie*, supra, analyzed the interrelationship of Title VII, ERISA, and the Wisconsin pregnancy disability law. The court found that while ERISA deals with employee benefit plans, the Wisconsin Fair Employment Act does not specifically address such private employee benefits plans: "Rather, this Act is designed to prohibit discrimination in employment and is grounded on the state's police power. It does not impinge on federal regulation of employee benefit plans." 453 F.Supp. at 78.

The court further found that although ERISA supersedes state laws relating to employee benefit plans, it does not expressly provide that all state fair employment laws are likewise superseded:

> "The legislative history of the Act fails to indicate that Congress, by enacting ERISA, intended to preempt state fair employment laws as they may concern employee benefit plans.

"Section 1144(d) does, in fact, provide that ERISA shall not be construed to alter, modify or supersede any law of the United States.

"Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, expressly preserves state laws such as the Wisconsin Fair Employment Act which are designed to prohibit employment discrimination. 42 U.S.C. §§2000e-7 and 2000h-4.

"Title VII specifically provides that no charge may be filed with the EEOC under Title VII until sixty days after proceedings have been commenced under the state employment discrimination law, 42 U.S.C. §2000e-5(c), 5(d) and 5(e). The EEOC must give substantial weight to state agency findings and orders and must cooperate with such agencies. 42 U.S.C. §§2000e-5(b), 2000e-8.

"From an examination of the provisions of ERISA and its legislative history, and considering Congress' long-standing recognition of the importance of state employment discrimination laws, this Court finds that it is not clear that Congress intended to preempt the Wisconsin Fair Employment Act insofar as it prohibits sex discrimination in employee benefit plans.

"Because preemption is not clearly mandated in this Court's opinion, this Court declines to invalidate the Wisconsin Fair Employment Act against a claim of federal preemption grounded on ERISA. To hold otherwise, would also seriously impair the enforcement scheme of Title VII of the Civil Rights Act of 1964." *Bucyrus-Erie*, 453 F.Supp. at 79.

The court in Goodyear Tire & Rubber v. Dept. of Industry, supra. used a similar rationale in concluding that the exemption contained in §1144(d) applies to Title VII of the Civil Rights Act and through Title VII to section 111.32(5)(g) of the Wisconsin Fair Employment Act so as to preserve it from ERISA preemption:

"There is no question but that prior to ERISA, sec. 111.32(5)(g), Stats., was consistent with Title VII which, like the Wisconsin statute, prohibited sex discrimination in employment. 42 U.S.C. sec. 2000e-2(a)(1). The Wisconsin statute therefore survived and was not preempted by Title VII. More precisely, and in the words of 42 U.S.C. sec. 2000h-4, there was no 'intent on the part of Congress to occupy the field . . . (of sex discrimination in employment) . . . to the exclusion of' Wisconsin's law on the same subject.

"And there is no question but that Title VII survives intact the preemption provisions of ERISA by virtue of sec. 1144(d).

If sec. 111.32(5)(g), Stats., survived Title VII, and if the latter survives ERISA, then the logic of the federal statutes compels the conclusion that sec. 111.32(5)(g) survives ERISA." *Goodyear*, 273 N.W.2d at 795.

The court rejected an argument (similar to one made here by Mountain Bell) by Goodyear that:

". . . sec. 111.32(5)(g), Stats., survives only Title VII and is preempted as to employee benefit plans because the exemption from preemption is limited to Title VII. The argument is based upon the opening words of 42 U.S.C. §2000h-4, 'Nothing contained in any title of this Act shall be construed . . .' as preempting state laws and, the argument continues, 'other federal statutes' may work preemption. The 'other federal statute' involved, however, is sec. 1144(d) of ERISA which tells us, in effect, that nothing in Title VII shall be construed as altered, amended, modified, invalidated, impaired or superseded by ERISA. If we are to adopt Goodyear's view of ERISA, an exception as to employee benefit plans must be found in 42 U.S.C. §2000h-4 of Title VII. That exception does not appear on the face of 42 U.S.C. §2000h-4.

Such an exception would have to be based upon an implied amendment of Title VII resulting from the adoption of ERISA, and would be contrary to sec. 1144(d) of ERISA.

"Goodyear argues it would be a nonsequitur for Congress broadly to declare that state laws are preempted and then to permit the states to regulate employee benefit plans through the mechanism of a different federal statute. But the fact is that Congress declared in sec. 1144(d) of ERISA that federal laws remain unchanged after ERISA and Title VII continues to permit states to prohibit sex discrimination in employment." *Goodyear,* 273 N.W.2d at 795-96.

In Liberty Mutual Insurance Company v. State Division of Human Rights, supra, the court reviewed a determination by the State Human Rights Appeal Board affirming an administrative finding that an employer had discriminated against the complainant on the basis of her sex through disallowance of pregnancy-related benefits and stated:

". . . Although the Congress fashioned a broad preemptive policy when it passed ERISA (see U.S. Code, tit. 29, §1144[a]), the legislative history behind the passage of the retirement program leads us to conclude that Congress did not intend to narrow the jurisdiction of those Federal and State agencies whose duty it is to regulate unlawful employment practices. The statements of Senator Walter Mondale and Representative Bella Abzug, made in their respective Houses of Congress, indicate that anti-discrimination amendments to the ERISA legislation were only withdrawn upon assurance from the ERISA draftsmen that discrimination claims would continue to fall within the jurisdiction of the Equal Employment Opportunity Commission under terms of existing law (see 119 Cong.Rec. S30409-10 [Sept. 19, 1973]; 120 Cong.Rec. H4726 [Feb. 28, 1974]). Thus, it is clear

that Congress did not intend to disturb the established structures for administering such claims. Since title VII of the Civil Rights Act has clearly not been impaired by ERISA (See U.S. Code, tit. 29, §1144[d]; U.S. Code, tit. 42, § 2000e-7, and since it vests concurrent jurisdiction in the Equal Employment Opportunity Commission and similar State-level agencies to investigate these claims (see, e.g., U.S. Code, tit. 42, §§ 2000e-4[g][1], 2000e-7), we find that the jurisdiction of the State Division of Human Rights was not preempted by ERISA." *Liberty Mutual,* 402 N.Y.S.2d at 219.

To the same effect as the above three cases are Lukus v. Westinghouse Electric Corp., supra, and Illinois Bell Tel. Co. v. Fair Employment Practices Commission, supra.

In *Gast,* supra, the court reviewed the history of ERISA as well as its substantive provisions and concluded there was no broad intent to preempt substantive provisions such as the Oregon pregnancy law:

"The subject matter of ERISA does not compel the conclusion that Congress intended to preempt states in regulating such things as pregnancy benefits. The scope of the regulatory scheme embodied in ERISA is limited, particularly with respect to health and welfare benefits. The statutory purposes enumerated in 29 U.S.C. §1001 are: (1) to require disclosure and reporting to beneficiaries; (2) to ensure that employee pension benefit programs are adequately funded; (3) to improve the equities of pension plans; and (4) to establish 'minimum standards * * * assuring * * * their financial soundness.'

". . .

"More significantly, there is no suggestion in the statute that Congress intended to regulate the substance of health and welfare benefits or the manner in which such benefits are to be provided. Thus, if

we are to adopt the construction of 29 U.S.C. §1144(a) advanced by plaintiffs we must import to Congress not only an intent to preempt state law, but also an intent to cease all governmental regulation, state or federal, other than the disclosure and fiduciary requirements of health and welfare benefits paid by employers or employee organizations. There is nothing in the legislative history suggesting such an intent. To the contrary, the legislative history indicates Congress was concerned with the inadequacy of governmental regulations and concluded that there should be at least minimum federal standards with respect to disclosure and fiduciary responsibility. See, e.g., 29 U.S.C. §1001." *Gast*, 585 P.2d at 20-21.

Although holding against preemption, the court, citing General Electric v. Gilbert (1976), 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 323, did not accept the argument that Title VII spared the state act from preemption.

In Time Insurance Co. v. DILHR, supra, the court also concluded that Wisconsin's pregnancy disability statute was not within the field of law preempted by ERISA. It held that the state law concerned:

". . . is a statute broad in scope grounded on the State's police power to prevent employers engaging in any employment practice which discriminates because of sex. It in no way impinges on federal regulation of employee benefit and pension plans. The sex discrimination prohibitions of the Wisconsin Fair Employment Law are merely of peripheral concern of ERISA. Until the United States Supreme Court rules to the contrary, this Court is of the Opinion that Wisconsin courts so long as there exists a rational doubt that preemption exists, should uphold validity of sec. 111.32(5)(g), Stats., against a claim of federal preemption grounded on ERISA." 16 BNA FEP cases at 396.

While the nonpreemption view appears to be in the majority, not all maternity leave cases agree with the one quoted above. In American Chain and Cable Co., Inc. v. Iowa Civil Rights Commission, supra, the Iowa court held that according to General Electric v. Gilbert, supra, and under Iowa law, an employer's disability benefit plan which specifically excluded disabilities due to pregnancy did not discriminate against women nor violate state or federal civil rights laws. The court also summarily concluded that ERISA had preempted the field.

Similarly, the court in Pervel Industries v. State of Connecticut (D. Conn. 1978), 468 F.Supp. 490, rejected the double savings clause rationale that Title VII protected Connecticut's anti-discrimination law from preemption:

"This Court does not accept the reasoning of this double savings clause contention. Section 514(d) of ERISA preserves federal law. Connecticut's anti-discrimination law does not become a federal law simply because Title VII preserves its validity as against a claim of preemption by Title VII. Nor is the textual argument significantly enhanced by focusing on §514(b)'s requirement that ERISA should not be construed to 'impair' any law of the United States. Preemption of Conn. Gen. Stat. §31-126(g) by ERISA does not impair any federal law. Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII. Whatever is prohibited by Title VII remains prohibited under ERISA but exclusion of disability benefits for pregnancy does not violate Title VII. . ." *Pervel Industries*, 468 F.Supp. at 493.

As stated earlier, the nonpreemption viewpoint, as espoused by appellants, is favored by the majority of cases involving such maternity discrimination statutes. All the cases, however, rely on some, albeit varied, interpretation of how Title VII, ERISA, General Electric v. Gilbert, supra, and state laws interact.

The parties agree that "potential problems of discrimination in employee benefit plans were not intended to be dealt with by ERISA," but were intended to be dealt with by Title VII of the Civil Rights Act of 1964. This is where the agreement ends, however, with Mountain Bell contending that under General Electric v. Gilbert, supra, it was not sex discrimination within the meaning of Title VII for an employer to exclude pregnancy disability benefits from coverage under employee plans, and appellants contending that the states were permitted to regulate employee benefit plans in the area of discrimination.

Mountain Bell's position fails to take into account the rather checkered history of *Gilbert*, including the recent significant addition to Title VII demonstrating a contrary congressional intent, and the cases decided after *Gilbert*, demonstrating a consistent refusal on the part of the majority of the courts to follow *Gilbert*. An excellent discussion of this history is set out in Illinois Bell Tel. Co. v. Fair Employment Practices Commission, supra:

"On October 31, 1978 section 701(k) of the Civil Rights Act of 1964 was signed into law adding a definition to the Act which demands a view of the statute from a different perspective, providing, in pertinent part:

" 'The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.'

"The language of section 701(k) makes clear that Congress disagreed with the interpretation placed

upon the pregnancy discrimination issue by the *Gilbert* decision. This inference is buttressed by the commentary set forth in the Report of the Committee on Education and Labor of the House of Representatives which stated, in part:

" 'It is the Committee's view that * * * dissenting justices [Brennan, Marshal and Stevens in General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343] correctly interpreted the Act. * * * We recognize that the enactment of H.R. 6075 will reflect no new legislative mandate of the Congress nor affect changes in practices, costs, or benefits beyond those intended by title VII of the Civil Rights Act.' U.S. Code Cong. & Admin. News 1978, pp. 4749, 4750.

"Even in the absence of section 701(k) of Title VII, recent cases from other jurisdictions, which were decided after the *Gilbert* decision by the Supreme Court and after the decision of the trial court herein, almost unanimously support the conclusion we reach. (Massachusetts Electric Co. v. Massachusetts Comm'n Against Discrim. (Mass. 1978), 375 N.E.2d 1192; Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n (Iowa 1978), 268 N.W.2d 862; Castellano v. Linden Board of Education (1978), 158 N.J. Super. 350, 386 A.2d 396; Anderson v. Upper Bucks County Area Vocational Tech. School (1977), 30 Pa.Cmwlth. 103, 373 A.2d 126.) (Contra: Narragansett Electric Co. v. Rhode Island Comm'n for Human Rights (R.I. 1977), 374 A.2d 1022; Group Hosp., Inc. v. Dist. of Columbia Comm'n on Human Rights (D.C. 1977), 380 A.2d 170.) Decisions by courts in other states, preceding that of the circuit court of Cook County herein, deciding contrary to its conclusion, include Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Board (1976), 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393; Ray-O-Vac v. Wisconsin Dept. of Industry, Labor & Human

Relations (1975), 70 Wis.2d 919, 236 N.W.2d 209; Cedar Rapids School Dist. v. Parr (Iowa Sup. Ct. 1975), 227 N.W.2d 486. See also Comment, Love's Labor Lost: New Conceptions of Maternity Leave, 7 Harv. Civ. Rights–Civ. Lib. L.Rev. 260 (1972); Johnston, Sex Discrimination and the Supreme Court – 1971-1974, 49 N.Y.S.L.Rev. 672 (1974); Comment, Pregnancy and the Constitution: The Uniqueness Trap, 62 Calif. L.Rev. 1532 (1974); Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 Colum. L.Rev. 441 (1975); Comment, Pregnancy and Employment Benefits, 27 Baylor L.Rev. 767 (1975).

"Representative of the viewpoints expressed by the foregoing authorities is the well-reasoned opinion in Massachusetts Electric Co. v. Massachusetts Comm'n Against Discrim. (Mass. 1978), 375 N.E.2d 1192 which held (375 N.E.2d at 1198-99):

" 'In considering whether the exclusion of benefits for pregnancy-related disabilities from a comprehensive disability plan violates G.L. c. 151B, §4, the initial inquiry necessarily involves determining whether distinctions based on pregnancy are sex-linked classifications. Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus, any classification which relies on pregnancy as the determinative criterion is a distinction based on sex. General Electric Co. v. Gilbert, 429 U.S. 125, 149, 97 S.Ct. 401, 414, 50 L.Ed.2d 343 (1976) (Brennan, J., dissenting) ("Surely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related' "). Id. at 161-162, 97 S.Ct. at 421 (Stevens, J., dissenting) ("By definition . . . [placing pregnancy in a class by itself] discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male"). Gilbert v.

General Elec. Co., 375 F.Supp. 367, 381 (E.D. Va. 1974), reversed, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) ("[Pregnancy] is undisputed[ly] and inextricably sex-linked. . . . That [exclusion of pregnancy-related disabilities] is discriminatory by reason of sex is self evident"). See Black v. School Comm. of Malden, 365 Mass. 197, 209-211, 310 N.E.2d 330 (1974).

" 'The exclusion of pregnancy-related disabilities, a sex-based distinction, from a comprehensive disability plan constitutes discrimination. While men are provided comprehensive coverage for all disabilities which will necessitate their absence from work, including male-specific disabilities, women are not provided the assurance of comprehensive protection from the inability to earn income during a period of disability. * * * (Citations omitted.) Pregnancy exclusions in disability programs "both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparative transient role in the labor force". * * * (Citations omitted.) Moreover, pregnancy exclusions reflect and perpetuate the stereotype that women belong at home raising a family rather than at a job as permanent members of the work force. * * * ' (Citations omitted)

"It is also noteworthy that the decisions of the six federal courts of appeal which predate General Electric Co. v. Gilbert (1976), 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343, concordantly concluded that pregnancy exclusions violated Title VII and constituted unlawful sex discrimination. Communications Workers v. American Telephone & Telegraph Company (2nd Cir. 1975), 513 F.2d 1024, vacated, 429 U.S. 1033, 97 S.Ct. 724, 50 L.Ed.2d 744 (1977); Wetzel v. Liberty Mutual Insurance Co. (3d Cir. 1975), 511 F.2d 199, vacated, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); Gilbert v.

General Electric Co. (4th Cir. 1975), 519 F.2d 661, reversed, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); Satty v. Nashville Gas Co. (6th Cir. 1975), 522 F.2d 850, vacated in part, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977); Hutchison v. Lake Oswego School Dist. (9th Cir. 1975), 519 F.2d 961, vacated, 429 U.S. 1033, 97 S.Ct. 725, 50 L.Ed.2d 744 (1977).

"Since its decision in *Gilbert*, it appears that the Supreme Court has itself retreated from its position in two cases treating pregnancy-employment problems with a somewhat different outlook. (Nashville Gas Co. v. Satty (1977), 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356; City of Los Angeles, Dept. of Water v. Manhart (1977), 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657.) Especially to be noted is the concurring opinion of Mr. Justice Blackmun in *Manhart*." *Illinois Bell,* supra, 386 N.E.2d at 601-03.

The above history indicates Congress originally intended to protect against sex discrimination in employment under Title VII. This, coupled with the fact that the Equal Employment Opportunity Commission guideline overturned in *Gilbert* was still in effect when ERISA was being considered, indicates that Congress did not intend to preempt employment discrimination acts which tangentially affect employee benefit plans because it had already attempted to do so under Title VII.

Mountain Bell argues that statements made by Senators Javits and Williams, the principal architects of ERISA, concerning the impact of ERISA upon the Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 92 Stat. 189 (1978), amending the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, are entitled to substantial weight in interpreting ERISA, in that they reflect upon the legislative intent of an earlier statute through subsequently enacted legislation. Goodyear made a similar argument in Goodyear Tire & Rubber v. Dept. of Industry, supra. The court there rejected the argument, stating:

"That senatorial colloquy occurred more than three years after ERISA was enacted. Legislative observations years after passage of the Act are not part of its legislative history. United Air Lines, Inc. v. McMann, 434 U.S. 192, 200, footnote 7, 98 S.Ct. 444, 54 L.Ed.2d 444 (1977). Our construction of ERISA is not foreclosed because members of Congress express contrary views after its passage. United States v. Philadelphia Nat. Bank, 374 U.S. 321, 384, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). The Age Discrimination in Employment Act Amendments of 1978 do not amend, clarify or attempt to clarify ERISA. Goodyear's reliance upon Red Lion Broadcasting Co. v. F.C.C., 394 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1968), is therefore misplaced, for in *Red Lion* the court said, 'Subsequent legislation *declaring the intent[ion] of an earlier statute* is entitled to great weight in statutory construction.' (394 U.S. 381, 89 S.Ct. 1801, emphasis added.)" 273 N.W.2d at 797.

It is well settled that the question of whether a state statute is invalid under the supremacy clause depends upon the intent of Congress. Malone v. White Motor Corp. (1978), 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443. It is also well settled that state statutes are presumed to be valid unless Congress clearly intended these statutes to be superseded by federal law. Jones v. Rath Packing Co. (1977), 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604; Motor Coach Employees v. Lockridge (1971), 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473; Florida Lime & Avocado Growers, Inc. v. Paul (1963), 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248.

As stated earlier:

"The subject matter of ERISA does not compel the conclusion that Congress intended to preempt states in regulating such things as pregnancy benefits. The scope of the regulatory scheme embodied in ERISA is limited, particularly with respect to health and welfare benefits. The statutory purposes enumerated in 29 U.S.C. §1001 are: (1) to require disclosure

and reporting to beneficiaries; (2) to ensure that employee pension benefit programs are adequately funded; (3) to improve the equities of pension plans; and (4) to establish 'minimum standards * * * assuring * * * their financial soundness.' " *Gast*, 585 P.2d at 20.

There is nothing in ERISA which treats the area of employment discrimination. The problem arises because we are dealing with two statutes – one state and one federal – that seek to regulate separate activities although some overlapping areas exist between them. While ERISA supersedes state laws relating to employee benefit plans, it does not expressly supersede all state fair employment laws, nor does it mention them. Indeed, given the history of Title VII, it would have been illogical if it had.

". . . Here, we have a federal regulatory scheme which regulates a limited area coupled with an express declaration which, if broadly interpreted, preempts states from a multitude of other areas which heretofore have been recognized as valid state concerns. . ." *Gast*, 585 P.2d at 22.

To hold for preemption would be to create an enormous vacuum in areas that have heretofore been traditionally dealt with by the states through the liberal intent of Title VII. The substantive nature of health and welfare benefits are not addressed by ERISA. We should not presume congressional intent to preempt unless Congress "has unmistakably so ordained." Florida Lime & Avocado Growers, Inc. v. Paul, supra, 373 U.S. at 142.

NATIONAL LABOR RELATIONS ACT PREEMPTION

The District Court declined to rule on this issue, noting: "Consideration of whether federal labor law preempts the Maternity Leave Act by implication is unnecessary in view of the much clearer preemptive declaration of ERISA. At any rate, I reach that conclusion and therefore will not attempt an analysis of federal labor law to determine whether or not it preempts our Maternity Leave Act."

As there was no ruling concerning the effect of federal labor law by the District Court, this issue is technically not before us. The parties, however, have spent substantial portions of their briefs discussing this issue, and in view of our decision concerning ERISA, it becomes necessary to discuss this issue as well.

During the relevant time period of this lawsuit, the employment relationship between Mountain Bell and Rae Bauer was governed by a collective bargaining agreement between Mountain Bell and Rae Bauer's labor union, Communications Workers of America. This collective bargaining agreement was entered into under and subject to the provisions of federal labor law. Generally, federal labor law does not specify what the substantive terms of collective bargaining agreements must be. Instead, federal labor law requires that employers and unions must bargain in good faith that they may work out for themselves their own agreements for the governance of their industrial relations. See 29 U.S.C. §158(d).

Mountain Bell contends that federal labor law requires as a "mandatory subject of bargaining" that employers and unions come to some agreement on employer group insurance, including insurance for nonoccupational injuries or disease. W. W. Cross & Co. v. NLRB (1st Cir. 1949), 174 F.2d 875, 878. Here, this mandatory collective bargaining between Mountain Bell and CWA resulted in an agreement which states that Mountain Bell is not required to pay disability benefits when an employee is on a maternity leave of absence.

Mountain Bell further contends that the attempt by the Commission of Labor and Industry to compel Mountain Bell to pay such benefits under section 39-7-203, MCA, alters the collective bargaining agreement and violates the fundamental premise of federal labor law: that the terms and conditions of employment must be established by the collective bargaining which are not subject to being changed or altered by the application of contrary state laws.

Appellants, on the other hand, reiterate that the Maternity Leave Act has been affirmatively authorized by Title VII.

Further, they argue that such statutory protection against certain forms of employment discrimination is in the nature of an independent right and cannot be waived through collective bargaining.

The court in Goodyear Tire & Rubber v. Dept. of Industry, supra, faced a similar issue. Goodyear's disability plan was negotiated subject to the NLRA. The effect of the department of industry's order there was to invalidate a provision in the plan which excluded pregnancy disabilities from full benefits.

The department's order, therefore, altered Goodyear's collective bargaining agreement. The court cited extensively from Malone v. White Motor Corp. (1978), 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443, and found that under *Malone* it had to look at federal labor law to determine whether state law had been preempted. The court did so and held ". . . we find an express statement in Title VII, 29 U.S.C. sec. 2000h-4, that there was no 'intent on the part of Congress to occupy the field . . .' of sex discrimination in employment to the exclusion of state laws on the same subject matter." 273 N.W.2d at 798.

In *Malone* the issue was whether a Minnesota pension statute was preempted prior to the enactment of ERISA by federal labor policy insofar as it purported to override or control the terms of collective bargaining agreements negotiated under the NLRA. The court stated:

> "It is uncontested that whether the Minnesota statute is invalid under the Supremacy Clause depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.' Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). Often Congress does not clearly state in its legislation whether it intends to preempt state laws; and in such instances, the courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the

> States. Ray v. Atlantic Richfield Co., ante, at 157-158; Jones v. Rath Packing Co., 430 U.S. 519, 525, 540-541 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *'We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously, much of this is left to the States.'* Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). The Pension Act 'leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.' Garner v. Teamsters, 346 U.S. 485, 488 (1953). Here, the Court of Appeals concluded that the Minnesota statute was invalid because it trenched on what the court considered to be subjects that Congress had committed for determination to the collective-bargaining process.
>
> "There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper subjects of compulsory bargaining. But there is nothing in the NLRA, including those sections on which appellee relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the Pension Act is preempted here, the congressional intent to do so must be *implied* from the relevant provisions of the labor statutes. . ." *Malone*, 435 U.S. at 504-505. (Emphasis supplied.)

The court found no such implication and, on the contrary, found an intent in the Welfare and Pension Plans Disclosure Act of 1958 to preserve state authority to regulate pension plans. Likewise, the court in *Goodyear* found an intent to preserve state authority to regulate sex discrimination. 273 N.W.2d at 798.

In San Diego Building Trades Council v. Garmon (1959), 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, the court stated:

> ". . . When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. [Citations omitted.] Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243-44.

Mountain Bell argues that rather than weighing and balancing state and federal interests, which the *Gammon* opinion prescribes, the federal courts have evolved a comparatively heavy-handed doctrine of preemption which applies whenever a state law has any effect whatsoever on any aspect of labor relations or any element of a collective bargaining agreement.

Mountain Bell relies on Local 24 of the International Brotherhood of Teamsters v. Oliver (1959), 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312, and Lodge 76, Machinists v. Wisconsin Employment Relations Commission (1976), 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396, to support its position that the federal policy under the NLRA is to preempt state attempts to alter or change the substantive terms of collective bargaining. "Our decisions . . . have made it abundantly clear that state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB. . ." *Lodge 76*, 427 U.S. at 153.

Both of the above cases dealt with areas substantively covered by NLRA: *Oliver* with wages and working conditions, and *Lodge 76* with economic weapons of collective bargaining. Intent to preempt state action in such areas is readily recognizable. The instant case, however, does not deal with an area specifically covered by the NLRA but rather with an area of peripheral concern. To use a broad-sword approach to preemption in this area would be to forget the Supreme Court's own words:

> ". . . Federal labor policy as reflected in the National Labor Relations Act . . . has been construed not to preclude the States from regulating aspects of labor relations that involve 'conduct touch[ing] interests so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act.' . . . the federal law governing labor relations does not withdraw 'from the states . . . power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act.' . . . Cases that have held state authority to be pre-empted by federal law tend to fall into one of two categories: (1) those that reflect the concern that 'one forum would enjoin, as illegal, conduct which the other forum would find legal' and (2) those that reflect the concern 'that the [application of state law by] state courts would restrict the exercise of rights guaranteed by the Federal Acts.'" *Lodge 76*, 427 U.S. at 136-38. (Omitting cases.)

Clearly, this case does not fall in either of these traditional areas of preemption but is in an area of traditional local concern which only peripherally affects the collective bargaining process. *Goodyear*, supra.

Alexander v. Gardner-Denver Company (1974), 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147, holds that an individual's rights to equal employment opportunities under Title VII ". . . form no part of the collective bargaining process . . ." 415 U.S. at 51.

> ". . . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. . ." *Alexander,* 415 U.S. at 48-49.

Mountain Bell argues the Maternity Leave Act does not create the kind of personal and individual right found in *Alexander* because "the rights sought to be vindicated [in *Alexander*] were substantially protected by Title VII, whereas with respect to pregnancy disability benefits the Supreme Court has held that a denial thereof is not sex discrimination within the meaning of Title VII." This argument, however, ignores the fact that Title VII affirmatively protects and encourages state anti-employment discrimination legislation, as discussed herein, supra.

The rights accorded under section 39-7-203, MCA, are uniquely personal and may not be waived through the collective bargaining process. Alexander v. Gardner-Denver, supra.

> "If Title VII rights to equal employment opportunities are non-negotiable in collective bargaining, and if those rights are in addition to rights granted by state law, it is unlikely that Congress intended that the latter may be bargained away even though Title VII rights may not. And if the individual's rights to equal opportunities are greater under state than federal law, it is unlikely that Congress intended that rights obtained from the state may be bargained away even though federal rights may not." *Goodyear,* 273 N.W.2d at 800.

We therefore conclude that section 39-7-203, MCA, is not preempted by the National Labor Relations Act.

WHETHER THE MONTANA MATERNITY LEAVE ACT CONFERS BENEFITS FOR NORMAL AND ABNORMAL PREGNANCY DISABILITIES AND TO PRE- AND POST-CHILDBIRTH CONDITIONS.

Mountain Bell contends that section 39-7-203, MCA, should be limited to abnormal or unexpected complications of pregnancy. The District Court rejected this argument because the language of the statute and its legislative history do not expressly limit coverage to abnormal or involuntary complications. Mountain Bell, however, submits that the absence of such an express limitation is perfectly understandable in light of the fact that pregnancy is a largely voluntary condition, and, as such, the work absences associated with its normal and usual progression are not the types of disability usually covered by sick leave plans, which are primarily intended to compensate employees for unexpected illnesses and accidents.

Mountain Bell continues that given the fact that pregnancy is not the typical covered disease or disability, one would expect that if the legislature had intended coverage of the normal usual and voluntary assumed consequences thereof, it would have said so expressly; however, the statute itself is silent on this issue and there is nothing in the legislative history which affirmatively indicates an intent to require sick leave coverage for pregnancy-related problems which are normal, natural, expected and voluntarily assumed. Mountain Bell submits that the legislature's silence on this issue can lead only to the conclusion that it intended that the phrase "disabled as a result of pregnancy" be interpreted in accordance with the usual policy of sick leave plans to compensate for unexpected wage loss. In the case of pregnancy, this would mean that compensation is required under section 39-7-203, MCA, only in cases of disabilities resulting from abnormal and unexpected complications of pregnancy.

Appellants contend that such a narrow interpretation of section 39-7-203(3), MCA, would be contrary to the plain meaning of the section and would totally defeat the purpose of the legislature in enacting the section. Appellants further contend that the Senate had a proposed limitation, similar to

the one espoused by Mountain Bell, which was rejected in a conference committee of the House and Senate. They further argue that the Maternity Leave Act was based on a Connecticut statute which, while weaker in many respects and more restricted than its Montana descendant, has still been interpreted to apply to disabilities which result from both normal and abnormal pregnancies and to disabilities which occur both before and after childbirth.

The analysis of Judge Bennett in his opinion in the District Court was decisive on this point:

> "In construing a statute, words are to be given their natural, plain and obvious meaning. [Citations omitted.] In construing legislative intent, statutes must be read and considered in their entirety – the statute as a whole must be considered. U.S. v. Fort Belknap, 197 F.Supp. 812 (Mont.) In reading the maternity leave law as a whole, the purpose of the statute seems obvious: when employed women become pregnant, they cannot be denied maternity leave if they are eligible at all for disability benefits. They are entitled to those benefits until they are physically able to go back to work. There is nothing in the statute to even suggest that benefits should be allowed only if the disabilities are involuntary or result from abnormal complications. The term 'disability' means 'lack of physical capacity; the inability to pursue an occupation or perform services for wages because of physical . . . impairment.' Websters Third International Dictionary. When interpreting a statute adopted from another state, the latter state's interpretation can be used to clarify the statute adopted in this state. Linley v. Davis 6 M 687 (1887); Coburn v. Coburn 89 M 386 (1931). Our maternity leave law was based on a Connecticut statute (Legis. history; Minutes of Meeting January 10, 1975). The Connecticut statute has been interpreted by that state's Commissioner of Human Rights and Opportunities to include disabilities resulting from normal and abnormal

> pregnancies, and to extend from conception through delivery and a reasonable period of recovery. Lagana, et al v. Middletown Board of Ed. 1976. The legislative history reveals no intention to limit the statute to abnormal complications. Therefore the statute must be construed to cover disabilities resulting from normal and abnormal pregnancies. The statute does not purport to define pregnancy itself as a disability, but recognizes that the condition of pregnancy manifests itself in ways that disable the woman for a period of time. In determining the scope of the time period to be covered by the benefits, there seems to be no logical reason why maternity benefits should be treated any differently from other disabilities where benefits are allowed for a reasonable period of recovery. The plaintiff in the instant case apparently believes that babies are delivered by the stork and are not a natural consequence of pregnancy. The statute specifically states 'disabled as a result of pregnancy.' 'Pregnancy' by definition is a condition that begins with conception and ends with delivery (Blacks Law Dictionary; Stedman's Medical Dictionary, 20th ed.). 'Result' is that which arises as a consequence of something (Blacks Law Dictionary). Childbirth is an obvious natural consequence of pregnancy and thus the statute intends to cover disabilities of childbirth.
>
> "I conclude therefore that the term 'disability as a result of pregnancy', as used in the Montana maternity leave law applies to disabilities resulting from normal as well as abnormal pregnancies, and the period of coverage extends from the onset of actual disability through termination of gestation and a reasonable period of recovery, to be determined by competent medical authority."

The judgment of the District Court is reversed on Issue No. 1, relating to preemption of section 39-7-203(3), MCA, by the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

Additionally, on the question of preemption of section 39-7-203(3), MCA, by the federal labor law (National Labor Relations Act, 29 U.S.C. §141 et seq.), on which the District Court was not required to rule because of the nature of its opinion, we hold that the NLRA does not preempt the Montana Act.

The judgment of the District Court is affirmed on Issue No. 3 on its finding that the term "disability as a result of pregnancy" as used in the Montana Maternity Leave Act applies to disabilities resulting from normal as well as abnormal pregnancies and the period of coverage extends from onset of actual disability through termination of gestation and a reasonable period of recovery, to be determined by competent medical authority.

The case is remanded to the District Court to enter judgment in behalf of appellants/cross-respondents: the Commissioner of Labor and Industry of the State of Montana, the Administrator of the Labor Standards Division of the Department of Labor and Industry of the State of Montana, Rae S. Bauer, Communications Workers of America, and the Montana Human Rights Commission, in conformity with this Opinion.

/s/ Gene B. Daly
Justice

APPENDIX B

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation — No. 41908

Plaintiff,

OPINION

vs.

THE COMMISSIONER OF LABOR AND INDUSTRY of the State of Montana; THE DEPARTMENT OF LABOR AND INDUSTRY of the State of Montana; THE ADMINISTRATOR of THE LABOR STANDARDS DIVISION of the DEPARTMENT OF LABOR AND INDUSTRY of the State of Montana; RAE S. BAUER; COMMUNICATIONS WORKERS OF AMERICA, a Labor Union; and THE MONTANA HUMAN RIGHTS COMMISSION, an agency of the State of Montana,

Defendants.

The facts are not in issue, they are accurately set forth in the Commission's findings and they are adopted by the Court.

On the basis of those facts an interesting legal question arises which was not addressed by any of the parties. The question is whether enforcement of Montana's Maternity Leave Act, effective July 1, 1975, would not impair the obligation of the contract entered into between the C.W.A. and Mountain Bell, effective July 18, 1974. It seems to me it would and thus would violate our state constitution (II, 31). But this is dictum and cannot be dispositive of the issues raised here.

The first question we must deal with is whether the Montana Maternity Leave Act (Sect. 2, Ch. 320, L 1975, codified as Sect. 41-2602, and, in particular, Subsection (1)(c) thereof) is preempted by the Employment Retirement Income Security Act (ERISA, P.L. 93-406, 88 Stat. 897, enacted September 2, 1974, and in particular Section 514 thereof, codified as 29 USC 1144 and referred to herein as Section 1144). The Montana statute provides in pertinent part:

> "It shall be unlawful for an employer . . . to deny to the employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer. . ."

The preemption provision of the federal statute provides in pertinent part:

> "(a) . . . the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4(a) . . ."

The Section 4(a) referred to makes the title applicable to any employee benefit plan established or maintained by an employer or employer organization engaged in interstate commerce (29 USC 1003 (a), read with 29 USC 1002 (11). Mountain Bell is unarguably engaged in interstate commerce as defined by these sections.

Mountain Bell argues the federal preemption is clear, unambiguous and needs no interpretation, and that, anyway, the colloquy of key Senators and Congressmen, as revealed in Congressional reports, indicates a clear congressional intention to preempt as widely and absolutely as the words of statute indicate. That is to say they have both a black-letter and an interpretative argument.

The Commissioner and the other respondents, on the other hand, say it is not all that simple and clear. They point to another provision of Section 1144, of the federal statute, subsection (d), which declares: "Nothing in this title shall be

construed to alter, amend, modify, invalidate, impair or supersede any law of the United States. . ." And then they point with particular insistence to 42 USC 2000e-7 (Sect. 708 in Title VII P.L. 88-352, The Civil Rights Act of 1964, 78 Stat 262), which provides: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State . . ." The Commissioner concluded that to allow preemption of our Maternity Leave Act by subsection (a) of 29 USC 1144 (set forth above) would be to violate subsection (d) of that statute by impairing a law of the United States, that is to say the 1964 Civil Rights Act, by exempting or relieving Mountain Bell from its liability under the Montana Act. He also concluded that the operation of another section of the Civil Rights Act (42 USC 2000e-5(c); Section 706, Title VII, P.L. 88-352, 78 Stat. 259 would be impaired by permitting ERISA preemption. This section provides for deferral of federal action in equal employment opportunity cases for a period of sixty days to permit the commencement of proceedings under state law. Finally, he concluded operation of yet another section of the 1964 Civil Rights Act (Sect. 1104, Title XI, 78 Stat 268, codified as Sect. 42 USC 2000h-4) would be impaired by permitting ERISA preemption. It provides:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

Thus, in sum, as to the ERISA preemption, the Commissioner's Conclusions of Law numbered 5, 6, 7 and 8 hold that while subsection (a) of Section 29 USC 1144 provides an express general preemption, subsection (d) of the same statute forbids impairment of other federal laws by the operation of ERISA, and that three sections of the Civil Rights Act of 1964 (Sec. 708 of Title VII, reserving the civil rights

authority of the states; Sect. 706 of Title VII, deferring federal civil rights action to permit initiation of state action, and Sect. 1104 of Title XI, declaring a non-preemption intent on the part of Congress in the field of civil rights) would be impaired by the preemption of our Maternity Leave Act by ERISA.

Despite the unequivocal and comprehensive declaration of preemption in 29 USC 1144(a): ". . . the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . ." (emphasis added), it is possible to find this clear statement to be clouded by the equally clear declaration in subsection (d) that no other federal law was to be affected in any way of ERISA. Assuming, for the sake of argument, that ambiguity is created, we are called upon to interpret the statute, applying the rules of statutory construction. The first rule is that one must find the intent of the legislative body and to apply it in such a way that all parts of the law can be made as effective as possible in carrying out that intent. Section 93-401-15 R.C.M. 1947; US v. Menasche, 348 US 528, 75 S.Ct. 513, 99 L.Ed. 615; *Mercantile Nat. Bank v. Langdeau*, 371 US 555, 83 S.Ct. 520, 9 L.Ed.2d 523.

When dealing with a Congressional enactment, it has become fashionable to leap first to the compendious tomes of testimony of witnesses, statements of Congressmen and Senators (particularly committee members and more particularly committee chairman) and floor debates. It has become a mystique of Congressional statutory construction that it is in these gestatory fulmination that the truth lies on the question of where Congress thought it was going. This approach has several problems that are exemplified in this case. In the first place, many legislators are like the Bible, they can be quoted accurately to prove almost any side of a given proposition. In the second place, prestigious and credible as he may be, a committee chairman may or may not be speaking for his committee membership on the unvoted-upon details of proposed legislation, and he certainly cannot be said to be speaking for the whole Senate. Finally, what may be the view of a committee member or chairman on a particular issue at a

particular stage in the development of legislation may not be even his view by the time the legislation emerges as a finally approved bill. For these reasons, I would rank Congressional statements close to least reliable in the statutory construction tool shed. Yet here the main emphasis seems to be on the statements of Congressional people with regard to the preemptive intent of ERISA and the powers reserved to the states in the Civil Rights Act of 1964. Just to make the record clear, I put very little stock in any of them. Congress should learn how to put its intentions in writing and courts should follow those intentions as set down. Otherwise the law is not what the statute says or what the courts say the statute says but what some committee functionary or floor debator thought it should say.

Fortunately, in attempting to discuss the intention of ERISA we have the enacted word of Congress. It is set forth in 29 USC 1001 under the heading "Findings and Declaration of Policy." Subsections (a) and (b) state, in their entirety:

> "(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable

in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that *it is therefore desirable* in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, *that minimum standards be provided assuring the equitable character of such plans and their financial soundness.*

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interest of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, *by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans,* and by providing for appropriate remedies, sanctions, and ready access to the Federal court." (emphasis added)

This seems to be a clear statement that the Congress had concluded that employee benefit plans had become a national problem that should be dealt with on a national basis (insofar

as they affected interstate commerce) by the federal government, and that in so doing the federal government should set minimum standards for assuring that the plans were fair and sound. It was the announced federal policy to establish standards of conduct, responsibility and obligations for fiduciaries of these plans. The intention to occupy the entire field to the exclusion of state and local government entities is, it seems to me, unmistakable. The federal government could not carry out the broad, pervasive mission it undertook with these findings and declarations of policy without exclusive control of all aspects of employee benefit plans. Recent cases have interpreted ERISA to preempt all state laws relating to employee pension and disability benefits: *Hewlett-Packard Co. v. Barnes* 425 F Supp 1294 (1977); *Bell v. Employee Security Benefit Assoc.* 437 F Supp 382 (1977).

It would be difficult to find a better case than this to exemplify the necessity for exclusive, coordinated control. We have here a benefit plan worked out between Mountain Bell and its employees in seven states through their labor union. The plan is uniform throughout the system and had been under development for some years by the time it was adopted. It is centrally administered and is intended to apply equally to all employees without regard to their place of residence or employment. If our Maternity Leave Act were to be applied to it, the women employees of this state would have a very clear advantage over the women employees of the other states, and the rate-payers of the other states would have a very clear advantage over the rate-payers of this state, assuming the costs of maternity leave benefits could be segregated for determination of the Montana rate base. (If they could not, then the rate-payers in the other states would be paying Montana maternity benefits without commensurate service benefit.) It is hardly speculative to conclude that it was a situation such as this which led Congress to conclude that it was desirable that the federal government assume the responsibility for assuring that "minimum standards be provided for assuring the equitable character of such plans and their financial soundness."

When they came to substantive legislation, Congress did its level best to express itself clearly, forcefully and unequiv-

ocally as to the field they intended to occupy: anything "*related*" to any employee benefit plan. *Wadsworth v. Whalan* 562 F2d 70 (1977), Cert. denied 46 L.S. 3650 (1978). It was equally clear with regard to what exceptions it wished to make. State laws regulating insurance, banking or securities (with a few specified exceptions) were to escape preemption as were state criminal laws. (29 USC 1144(b)). Congress having clearly set forth its aims and objectives and its reasons therefore and having clearly expressed its will in general, with specific exceptions, it is not necessary to determine its intent by inference, declaration, induction, construction or any other form of legal metaphysics. *(Hewlett-Packard Co. v. Barnes,* supra; *Caminetti v. United States,* 242 US 470, 37 S Ct 192 (1917)). Congress having the plenary power under the commerce clause of the U.S. Constitution to occupy the field to the exclusion of the states, (*Florida Lime and Avocado Growers v. Paul,* (1963) 373 US 132, 83 S Ct 1210) it is this court's function to carry out its expressed will in that field to the extent possible.

Almost conceding this, the Commissioner and the other defendants insist the attempted preemption under the Act cannot be effectuated because of the Act itself. Unquestionably the Act expressly forbids interference, by or through the Act itself with other federal statutes. (29 USC 114 (d)). Thus the preemption question becomes a conflict question.

As noted, it is the position of the Commissioner and other defendants that the operation of three sections of the Civil Rights Act of 1964 would be impaired by nullification of our Maternity Leave Act by its preemption under ERISA. The question, then, is how would the operation of these three sections be impaired?

Section 29 USC 2000e-7 (quoted and cited above) says in effect that nothing in Title VII of the Civil Rights Act should be construed to exempt anyone from sanctions imposed by the states for unlawful employment practices. This is a guarantee to the states that *Title VII* will not invalidate state action in the field employment practices, it is no guarantee that *other* federal legislation will not preempt a

part of the field. There can be no doubt, as the Commissioner found, that Title VII "expressly recognizes and validates" state action in this field and that such action was intended to "fill in the interstices" left by the federal legislation. This does not signify, however, any intention on the part of the federal government to forever defer to state action on all matters touching fair employment practices. Defendants' ultimate argument seems to be that: "The Maternity Leave Act, as a statute integrally intertwined with the administration of Title VII, is affirmatively protected under 514 (d)." (Conclusion #7) Title VII by its own clear terms affirmatively protects The Maternity Leave Act from Title VII, not from ERISA. No authority is offered for the integral intertwinement theory and without it one is more than hesitant to expand the function of the statute beyond its specific limitation. "It is manifest" the Commissioner says "that Congress by explicitly refusing to incorporate language in ERISA which would have prescribed various forms of invidious employment discrimination intended to leave unaffected and unencumbered the comprehensive legislative scheme in Title VII." It is quite clear from a thorough reading of the statute that Congress, presumably purposefully, did not expressly legislate within ERISA on employment discrimination. I agree that Congress intended to leave this field to the Civil Rights Act. I do not agree, however, that this in any way gave the states a blank card for all time to fill out as they wished as far as employment discrimination was concerned. As long as the subject of legislation can be convincingly labelled "interstate commerce" Congress can always act in this field, Title VII or not, and in ERISA they simply took it over. This impairs the states, it does not impair Title VII and specifically Section 2000e-7 (Sect. 708) thereof.

The next question is whether the operation of another section of the Civil Rights Act (Sect. 706 of Title VII, Sect. 42 USC 2000e-5) would be impaired by preemption of our Act by ERISA. The whole section is purely procedural and does not purport to establish any substantive rights. Subsection (C) provides that a person alleging an employment practice unlawful under state law may not file a complaint before the federal Equal Employment Opportunity Com-

mission (EEOC) until sixty days after proceedings have been commenced before the appropriate state agency.

The Commissioner found that it was "incomprehensible" that Congress could have so legislated that this provision would have no effect in the field of employee benefit plans. He cites as authority for this point of view a colloquy between the Senator Mondale and Senator Williams. (Conclusion #6) But these two worthies were not discussing either the section under consideration (they were talking about Section 703, not 706, of the proposed ERISA) or employee benefit plans they were talking about pension and profit-sharing plans, which are clearly distinguished in ERISA). But even if they were talking on the subject under consideration, the only understanding reached was that non-discrimination in these plans "is fully required under The Equal Employment Opportunity Act." It is a mighty leap from this premise to the conclusion that the procedural provisions of the Equal Employment Opportunity Act prevented Congress from preempting the substantive field of employment benefit plans. While this conclusion may not, itself, be "incomprehensible", it certainly partakes heavily of wishful thinking. To say that a procedural requirement establishes a substantive entitlement or bar is to attribute to Congress a sleight-of-hand approach to legislation. There is no evidence of this in the colloquy cited, much less in the statute.

The final question is whether the general non-preemption declaration of the 1964 Civil Rights Act (Sect. 1104 of Title IX, 42 USC 2000h-4, set forth fully above) would be impaired by operation of the ERISA preemption. This does for the whole Act what Section 708 (42 USC 2000e-7) does for Title VII of the Act, i.e., it disclaims any intent on the part of Congress to nullify state civil rights laws *by operation of the Civil Rights Act.* Again, it seems hardly necessary to point out that this declaration holds out no guarantee that the federal government will stay its preemptive powers in every field where civil rights might be involved, or that it will do nothing in the future that might affect state civil rights legislation. Insofar as it states an affirmative policy, that policy is that the Civil Rights Act can not be used to limit

state legislation in that area (unless that legislation conflicts with the Act); it does not set up the states as final arbiters on all matters that might affect civil rights. The latter is the only theory upon which the position of the Commissioner could be sustained.

For the above reasons, I conclude 29 USC 1144(a) preempts Montana's Maternity Leave Act and that preemption is not limited or barred by sub-section (d) of that Section.

In passing, I would agree with the Commissioner's Conclusion #9 that *General Electric v. Gilbert,* 429 US 125, So L Ed 2d 343, 97 S Ct 401 and its unfortunate predecessor, *Geduldig v. Aiello,* 417 US 484, 41 L Ed 2d 256, 94 S Ct 2485, do not affect the case. These cases require us to adhere to the precept that denial of maternity leave offends neither the 14th Amendment of the U.S. Constitution nor Title VII.[1]

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[1] In my opinion denial of disability benefits to pregnant women is invidious sex discrimination. It is not accurate to describe the disability benefits program as separating potential recipients into two groups – "pregnant women and non-pregnant persons." *Geduldig,* supra, at p. 496-497. The disability benefits plan is based on *risks.* The classification system actually separates those persons who face a *risk* of pregnancy and those who do not. It is women who face the risk of pregnancy and men who do not. Therefore, the correct classification scheme is the class of women separated from the class of men. *That* is sex discrimination. The statement, "there is no risk from which men are protected and women are not" (*Geduldig,* supra) is simply untrue. Men are protected from the risk of pregnancy (and the accompanying disabilities) by the laws of nature. Women are therefore entitled to protection from this risk by the laws of men, (i.e. Title VII of the Civil Rights Act of 1964) enacted with the intent to eradicate disparate treatment of men and women in employment and with the ultimate objective to obtain for men and women equal opportunities in all aspects of employment. It is offensive to not only the legal mind, but also to

The second major question arises from the Commissioner's Conclusions of Law #20 and #21 to the effect that Congress intended that federal labor law[2] would not preempt state legislation which would have an "incidental effect" only on the terms of collective bargaining agreements; that our Maternity Leave Act would have only such "incidental effect" and therefore it is not preempted by federal labor law. Furthermore, the Commissioner maintains, Sect. 708 of Title VII of the 1964 Civil Rights Act (cited and discussed above) affirmatively authorizes and protects The Maternity Leave Act against preemption by federal labor law.

There is nothing in federal labor law which *expressly* forecloses all state regulatory power with respect to those

[1] Continued
common sense to suggest that denial of disabilities for pregnant women is not sex related. On the contrary, it is a discrimination against the female sex that violates the letter and spirit of Title VII of the Civil Rights Act of 1964, and the 14th Amendment of the United States Constitution. Unfortunately, in this case, it is not the function of this court to attempt to over-rule law made by the United States Supreme Court. We can only state our disapproval and reluctantly follow the holding of the U.S. Supreme Court. I note with hope, however, that Congress is moving toward correction of the Gilbert case by amending Title VII of the 1964 Civil Rights Act to provide specifically that discrimination based on pregnancy, child-birth and related medical conditions is discrimination based on sex within the meaning of the title (S. 995-H.R. 6075).

[2] The applicable federal labor law is found generally in Title 29 of the USC and includes, principally, The National Labor Relations Act (NLRA) (popular name: "Wagner Act") of July 5, 1935 (49 Stat. 452) and the Labor Management Relations Act (LMRA) (popular name: "Taft Hartley Act") of June 23, 1947 (61 Stat. 136). Both have been copiously amended and hopelessly intermixed by codification. They will be referred to here as "federal labor law."

matters which are made the subject of collective bargaining under that law. (*E. I. Malone, Commissioner of Labor and Industry for Minnesota v. White Motor Corp. and White Farm Equipment Co.*, 46 LW 4295, 4297, April 3, 1978). Such matters would certainly include, and did include in this case, employee sick leave benefits. If The Maternity Leave Act is preempted by federal labor law such preemption must be *implied*. But where preemption by another federal statute is clear, it would seem rather pointless to analyze the field of federal labor law to determine whether a preemptive intent can or can not be implied. So it was in the *Malone* case, supra, copiously briefed here, that the Supreme Court of the U.S. eschewed the opportunity to imply a conclusion from the federal labor law itself and reached its conclusion on the basis of Congress' preemption intention of the act which was the predecessor of ERISA, the Federal Welfare and Pension Plans Disclosure Act of 1958 (Disclosure Act). In the *Malone* case, the court reached the conclusion that the Disclosure Act provided a wide birth for state regulation in the pension field and that, therefore, there was no preemption under or by the federal labor statutes. In reaching that conclusion, Justice White, for the majority, remarked: "Although Congress came to a quite different conclusion in 1974 when ERISA was adopted, the 1958 Disclosure Act clearly anticipated a broad regulatory role for the states." (*Malone*, 46 LW 4299) White wrote for only four members of the court, but the three dissenters did not challenge this conclusion, but, on the contrary, wanted the court to deny the state the "broad regulatory role" that White found in The Disclosure Act. I have no doubt that at least the seven members of the present court who ruled in *Malone* would reach the conclusion that consideration of whether federal labor law preempts The Maternity Leave Act by implication is unnecessary in view of the much clearer preemptive declaration of ERISA. At any rate, I reach that conclusion and therefore will not attempt an analysis of federal labor law to determine whether or not it preempts our Maternity Leave Act. Inasmuch as we are not concerned with whether federal labor law preempts The Maternity Leave Act, it is immaterial whether Sect. 708 of the 1964 Civil Rights Act does or does not "affirmatively authorize and protect" the Act against such preemption.

The last issue to be considered is the scope of the meaning of the term "disability as a result of pregnancy" in Sect. 41-2602(1)(c), set forth above.

Although we have concluded that this section is without force and effect as to firms in interstate commerce because of federal preemption, the law remains effective as to *intrastate* firms which are not affected by federal law. Plaintiff contends that the statute refers only to abnormal disabilities resulting from pregnancy, and that because the statute does not specifically include childbirth, the disability benefits are limited to the period of gestation up to delivery and do not include childbirth and recovery period.

In construing a statute, words are to be given their natural, plain and obvious meaning. *Huffman v. District Court*, 154 M 201, 461 P2d 847 (1969); *Dunphy v. Anaconda*, 151 M 76, 438 P2d 660 (1968). In construing legislative intent, statutes must be read and considered in their entirety – the statute as a whole must be considered. *U.S. v. Fort Belknap*, 197 F Supp 812 (Mont). In reading the maternity leave law as a whole, the purpose of the statute seems obvious: when employed women become pregnant, they cannot be denied maternity leave if they are eligible at all for disability benefits. They are entitled to those benefits until they are physically able to go back to work. There is nothing in the statute to even suggest that benefits should be allowed only if the disabilities are involuntary or result from abnormal complications. The term "disability" means "lack of physical capacity; the inability to pursue an occupation or perform services for wages because of physical . . . impairment." *Websters Third International Dictionary*. When interpreting a statute adopted from another state, the latter state's interpretation can be used to clarify the statute adopted in this state. *Linley v. Davis* 6 M 687 (1887); *Coburn v. Coburn* 89 M 386 (1931). Our maternity leave law was based on a Connecticut statute (Legis. history; Minutes of Meeting January 10, 1975). The Connecticut statute has been interpreted by that state's Commissioner of Human Rights and Opportunities to include disabilities resulting from normal and abnormal pregnancies, and to extend from conception through

delivery and a reasonable period of recovery. *Lagana, et al v. Middletown Board of Ed.* 1976. The legislative history reveals no intention to limit the statute to abnormal complications. Therefore the statute must be construed to cover disabilities resulting from normal and abnormal pregnancies. The statute does not purport to define pregnancy itself as a disability, but recognizes that the condition of pregnancy manifests itself in ways that disable the woman for a period of time. In determining the scope of the time period to be covered by the benefits, there seems to be no logical reason why maternity benefits should be treated any differently from other disabilities where benefits are allowed for a reasonable period of recovery. The plaintiff in the instant case apparently believes that babies are delivered by the stork and are not a natural consequence of pregnancy. The statute specifically states "disabled as a result of pregnancy." "Pregnancy" by definition is a condition that begins with conception and ends with delivery (*Blacks Law Dictionary; Stedman's Medical Dictionary, 20th ed.*). "Result" is that which arises as a consequence of something (*Blacks Law Dictionary*). Childbirth is an obvious natural consequence of pregnancy and thus the statute intends to cover disabilities of childbirth.

I conclude therefore that the term "disability as a result of pregnancy", as used in the Montana maternity leave law applies to disabilities resulting from normal as well as abnormal pregnancies, and the period of coverage extends from the onset of actual disability through termination of gestation and a reasonable period of recovery, to be determined by competent medical authority.

Dated this 14 day of August, 1978.

GORDON R. BENNETT
District Judge

APPENDIX C

BEFORE THE

COMMISSIONER OF LABOR AND INDUSTRY

STATE OF MONTANA

RAE S. BAUER, Complainant, MONTANA HUMAN RIGHTS COMMISSION and COMMUNICATIONS WORKERS OF AMERICA, Intervenors, and TONY SOFTICH, ADMINISTRATOR, LABOR STANDARDS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY, vs. THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Respondent.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

PRELIMINARY STATEMENT

This matter came before the Commissioner upon Exceptions filed by Complainant, Intervenor Communications Workers of America, Intervenor Montana Human Rights Commission, the Labor Standards Division, Department of Labor

and Industry and The Mountain States Telephone and Telegraph Company to the Findings and Final Decision of Frederick W. Huszagh dated December 16, 1976 and/or to the Findings of Fact and Conclusions of Law of Lloyd E. Skedd dated August 24, 1977. The several parties filed timely briefs in support of their exceptions, timely reply briefs, and timely proposed findings of fact and conclusions of law. Oral argument on their exceptions, and the issues raised thereby, was heard by the Commissioner on September 23, 1977. Based upon a review of the several briefs submitted by the above parties and upon a review of their oral arguments, the Commissioner hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The parties to this matter are the Complainant, Rae S. Bauer [hereinafter, Complainant]; Intervenor Communications Workers of America [hereinafter, CWA]; Intervenor Montana Human Rights Commission [hereinafter, Human Rights Commission]; the Labor Standards Division, Department of Labor and Industry [hereinafter, Labor Standards Division]; and the Respondent, The Mountain States Telephone and Telegraph Company [hereinafter, Mountain States].

2. On April 22, 1976, a hearing was held before Hearing Examiner Frederick W. Huszagh. The purpose of such hearing, as set forth in the Notice of Hearing dated March 3, 1976, was to determine if the Commissioner or his duly authorized representative had jurisdiction in the enforcement of §41-2601 *et seq.*, R.C.M. 1947, over Mountain States.

3. At the April 22, 1976 hearing before Hearing Examiner Huszagh, the parties entered into evidence twenty-three (23) separate exhibits. All such exhibits are true and accurate copies of the original documents involved and/or are true and accurate copies of that which they purport to be.

4. At the April 21, 1977 hearing before Hearing Examiner Lloyd E. Skedd, the several parties entered into a Stipulation of Fact which provided:

"That Respondent, the Mountain States Telephone and Telegraph Company is a Colorado corporation, authorized to do business and in fact doing business as a telephone common carrier in the States of Arizona, Colorado, Idaho, Montana, New Mexico, El Paso County, Texas, Utah and Wyoming. That Respondent is an employer engaged in commerce and or in industry for activity affecting commerce within the meaning of 29 U.S.C. Sections 1002(12) and 1003(a). That Complainant Rae S. Bauer, is an employee of the Company, whose net credited service date with Respondent Employer is May 29, 1973. That during Complainant's employment with Respondent, Complainant, Rae S. Bauer, was subject to, and covered under the Respondent's Plan for Employee's Pensions, Disability Benefits and Death Benefits. The Benefit Plan applicable to the Complainant on or about October 15, 1975, may be marked as Exhibit 1 and received into evidence.

"On or about January 1, 1976, the Benefit Plan referred to as Complainant's Exhibit Number 1 was amended and a copy of the amended plan is offered as Complainant's Exhibit Number 2.

"The Benefit Plan is an employee benefit plan within the meaning of 29 U.S.C. Section 1002(3). The Complainant received during the period of time she was on maternity leave no disability payments in connection with her pregnancy. As a matter of administrative practice the Respondent has traditionally excluded from eligibility for disability payments, under Section 6 of Exhibits 1 and 2, pregnancy related disabilities after commencement of maternity leave. On or about October 8, 1975, the Complainant was placed on sickness benefits by the Respondent and on or about October 15, 1975, Complainant was placed on maternity leave by the Respondent. Under the terms of such leave, the Complainant received no sickness disability pay-

ments pursuant to the provisions of Section 6 of the Benefit Plan. She accrued net credited service for the initial thirty days of her leave. Under the provisions of the leave of absence her prior service was immediately bridged or credited to her upon her return to active employment. She received while on maternity leave, without cost, during the period of her maternity leave, concession telephone service, coverage under group life insurance policy in an amount equal to her annual rate of pay rounded up to the next thousand dollars, and coverage under a plan known as the Extraordinary Medical Expense Plan, providing medically related expense reimbursements above a deductible equivalent to one percent of her annual rate of pay or $150.00 whichever is less and in excess of amounts which would be paid under a hospital and medical insurance plan known as the Basic Medical Expense Plan, a copy of the Basic Medical Expense Plan is proposed as Exhibit Number 3.

"The Complainant continued on the aforementioned maternity leave without interruption to, through and including October 11, 1976.

"On or about February 11, 1976, the Complainant filed a verified complaint with the Commissioner of Labor and Industry, pursuant to Section 41-2603 R.C.M. 1947, a copy of which verified complaint is offered as Exhibit Number 5. It had been previously marked as number three.

"That the Complainant could during the term of the aforementioned maternity leave, or a period of up to one year from the beginning of such leave, continue coverage under the aforementioned basic medical expense plan, by paying the group premium therefor if she chose to continue this coverage, Respondent was obligated to pay the premium for the first full month following the month in which the aforementioned maternity leave began. By

payment of the group premium the Complainant also could continue in force coverage under a plan known as the Supplemental Group Life Insurance Plan which we offer as Exhibit 6.

"Under the terms of Exhibit 6, . . . the Complainant was eligible to receive life insurance coverage in an amount equivalent to her annual rate of pay rounded up to the next thousand dollars. By payment of the group premium the Complainant could also continue in force coverage under a plan known as the Dental Expense Plan, a copy of which we offer as Exhibit 7.

"That Complainant, during the period of her aforementioned maternity leave, was eligible for payment to a qualified beneficiary of a sickness death benefit should she die while on maternity leave. This payment is in an amount equivalent to one years pay and is provided under the provisions of Section 7, paragraph 2 of the Employee's Benefit Plan and heretofore received as Exhibits 1 and 2. Complainant is a member of a bargaining unit represented by Intervenor, Communications Workers of America, and covered by a collective bargaining agreement between Communications Workers of America and The Mountain States Telephone and Telegraph Company, effective August 11, 1974. That collective bargaining agreement we offer as Exhibit 8, and at Article 8.3.1 contains collectively bargained provisions concerning entitlements for employees on maternity leave of absence, Exhibit 8, further contains a provision proscribing discrimination on the basis of sex at Article 2.2."

The above-quoted Stipulation of Fact is hereby adopted as a Finding of Fact herein.

5. At the April 21, 1977 hearing before Hearing Examiner Skedd, the parties introduced into evidence twenty-seven (27) separate exhibits. All such exhibits are true and

accurate copies of the original documents involved and/or are true and accurate copies of that which they purport to be.

6. The Complainant experienced a pregnancy during 1972 but gave premature birth at approximately five and one-half months. The child died shortly after birth. She became pregnant during 1975 and initiated medical treatment in connection therewith during July, 1975 from Dr. A. F. McKee of the Great Falls Medical Clinic.

7. During her initial conference with Dr. McKee, the Complainant gave to him her medical history including a description of the earlier pregnancy. Dr. McKee examined, *inter alia,* the Complainant's cervix during such conference. On her second visit with Dr. McKee she was instructed to report every two weeks for a cervix examination. Dr. McKee stated to her that such examinations were being requested because he feared she might have an incompetent cervix.

8. During the latter part of September, 1975 and the first portion of October, 1975 the Complainant was on vacation and had occasion to see Dr. McKee for an examination. In the course of such examination she indicated that she had not been feeling well but would have to return to work in the following week. Dr. McKee then suggested that she not return to work and prepared a document to that effect. The document read: "This lady should not work for the remainder of her pregnancy."

9. The Complainant delivered Dr. McKee's note to Greta Dess, a CWA steward. The Complainant was later instructed to remain home until further notice. On October 14, 1975 she was contacted by Pat Colarchik, a Mountain States' supervisor, who informed her that she had been placed on maternity leave.

10. The Complainant subsequently gave birth on January 20, 1976.

11. Dr. Robert E. Asmussen was called on the Complainant's behalf because of the inability of Dr. McKee to testify. Dr. Asmussen testified that Dr. McKee is terminally ill and is "essentially comatose" following surgery to repair a

ruptured aneurysm of a blood vessel in his brain. Dr. Asmussen stated that Dr. McKee will never be competent to testify herein.

12. Like Dr. McKee, Dr. Asmussen is a member of the Great Falls Medical Clinic's OB-GYN Department and delivered the Complainant's child in January, 1976. Dr. Asmussen's testimony concerning Dr. McKee's ante partum examinations of the Complainant was based on Dr. McKee's notations of such examinations and documents kept in the regular course of business by the Great Falls Medical Clinic.

13. Dr. Asmussen stated that a review of such notations indicated that Dr. McKee feared the Complainant might have an incompetent cervix. Dr. Asmussen defined an incompetent cervix as one which "is weak . . . [and which] is not structurally adequate to hold the fetus in the uterus throughout the full term of pregnancy." Dr. Asmussen testified that Dr. McKee's concern in this regard was predicated on the Complainant's first five and one-half month pregnancy, the unusual nature of which pregnancy was responsible for Dr. McKee requiring cervix examinations of the Complainant every two weeks. Dr. Asmussen further testified that miscarriages after the third month of pregnancy are unusual and that it was not standard procedure for ante partum cervix examinations to be conducted on a regular basis.

14. Dr. Asmussen testified that, in view of the unusual nature of the earlier pregnancy, Dr. McKee's concerns about the possibility of an incompetent cervix were medically reasonable. Dr. Asmussen indicated that he knew of no certain method for diagnosing an incompetent cervix and that the only means of detecting such a condition is the patient's prior history during pregnancy. He testified that "any position where the force of gravity would be pushing downward on the cervix would tend to aggravate the situation." As a consequence, he stated, individuals with incompetent cervices should not sit for long periods of time during pregnancy.

15. Dr. Asmussen testified that the Complainant could have returned to her duties as a Mountain States' operator any time after February 18, 1976. In such capacity, the

Complainant was required to sit for substantial periods of time. Finally, Dr. Asmussen testified that the Complainant's pregnancy was, in retrospect, normal.

16. Section 41-2601 *et seq.* was enacted by the Forty-Fourth Legislature of the State of Montana and approved by the Governor of Montana on April 8, 1975. It became effective July 1, 1975. The legislative history of the Maternity Leave Act indicates that it was enacted to implement Article II, Section 4 of the Montana Constitution. The law delegates to the Commissioner broad responsibility to deal with violations defined in §41-2602, including the obligation to hear complaints about such violations. The complaint filed by the Complainant against Mountain States on February 11, 1976 is within the scope of §§41-2602(1)(c) and 41-2603.

17. At the April 22, 1976 hearing before Hearing Examiner Huszagh, the parties entered into a Stipulation of Fact. Certain material portions of such Stipulation were subsequently entered into evidence at the April 21, 1976 hearing before Hearing Examiner Skedd. Such portions are quoted in Finding of Fact 4 above. Those portions of the Stipulation of Fact before Hearing Examiner Huszagh not entered into evidence before Hearing Examiner Skedd are as follows:

"9. During the calendar year 1972, the Company had 35,830 employees of whom 16,825 were men and 19,005 were women; 2,260 of those employees were located in the State of Montana, of whom 1,174 were men and 1,086 were women. During calendar year 1973, the Company had 40,032 employees, of whom 19,136 were men and 20,896 were women. Of those 2,300 were located in the State of Montana, of whom 1,223 were men and 1,137 were women. During calendar year 1974, the Company had 40,485 employees, of whom 19,660 were men and 20,825 were women. Of those 2,526 were located in the State of Montana, of whom 1,294 were men and 1,232 were women. During the calendar year 1975, the Company had 38,930

employees, of whom 19,046 were men and 19,884 were women. Of those, 2,654 were located in the State of Montana, of whom 1,328 were men and 1,326 were women.

"10. During calendar year 1972, the Company had 3,574 total employees who received sickness benefits under the provisions of the benefit plan, of whom 1,146 were men and 2,428 women. Of those, 203 were located in the State of Montana; of whom 76 were men and 127 were women. During the calendar year 1973, the Company had 3,662 employees who received sickness benefits under the provisions of the benefit plan, of whom 1,226 were men and 2,436 were women. Of those, 188 were located in the State of Montana, of whom 76 were men and 112 were women. During calendar year 1974, the Company had 4,014 employees who received sickness benefits under the provisions of the benefit plan. Of those 1,401 were men and 2,613 were women. Of those, 193 were located in the State of Montana, of whom 67 were men and 126 women. During calendar year 1975, the Company had 4,177 employees who received sickness benefits under the provisions of the benefit plan, of whom 1,477 were men and 2,700 were women. Of those, 248 were located in the State of Montana, of whom 115 were men and 133 women.

"11. During calendar year 1972, the Company paid for 188,044 days of sickness disability absence of which 63,175 days' pay went to men and 124,869 days' pay went to women. Of these, 10,238 days were paid in the State of Montana, of which 3,875 days were paid for men's absence and 6,363 days of absence were paid for women. During calendar year 1973, the Company paid for 206,494 days of sickness disability absence, of which 71,707 days were for men and 134,787 days were for women. Of this, 8,974 days were in the State of Montana, of which 3,648 days were for men and 5,326 days

were for women. In calendar year 1974, the Company paid for 211,281 days of sickness disability absence, of which men accounted for 74,403 days and women accounted for 136,878. Of those, 10,919 days of sickness disability absence were paid in Montana, of which 3,946 were paid for men and 6,973 were paid for women. During calendar year 1975, the Company paid for a total of 211,571 days of sickness disability benefits, of which 76,884 were paid for men's absence and 134,687 days were for women's absence. Of those, 13,629 were for the State of Montana, of which 5,764 days were paid for men's absence and 7,865 days were paid for women's absence.

"12. During calendar year 1974, 51 employees took maternity leaves of absence in the State of Montana. Of those, 32 returned to work. During calendar year 1975, 61 employees took maternity leave in the State of Montana. Of those, 31 have returned to work.

"13. During calendar year 1974, the average pay per week for the 51 employees who took maternity leaves of absence was $148.00. This amount is rounded downward. During calendar year 1974, the average period of time during which employees were on maternity leaves of absence was 31 weeks. This figure is rounded downward. The average net credited service of employees who took maternity leaves of absence during calendar year 1974 was 4.8 years. This computation is rounded downward.

"14. By entering into the within Stipulation of Fact, neither party shall be deemed as admitting the materiality or relevancy of the facts contained herein to any issue which may be attendant to the complaint in this matter. It is further agreed by the parties to this Stipulation that its use is solely limited to the hearing in this matter scheduled to occur on April 22, 1976 and shall not prevent

either party from offering into evidence other or conflicting evidence at other hearings in this matter. The parties to this Stipulation agree only that the facts contained herein are accurate to the best of their knowledge at the present time and that the exhibits appended hereto are true and accurate copies of what they are represented to be in the text of this Stipulation.

The above-quoted Stipulation of Fact is hereby adopted as a Finding of Fact herein.

CONCLUSIONS OF LAW

1. The within matter is properly before the Commissioner for final decision and order pursuant to §82-4213, R.C.M. 1947. The Stipulations of Fact and all exhibits entered into evidence during the hearing before Hearing Examiner Huszagh and Hearing Examiner Skedd were properly so entered pursuant to §§82-4210(1) and (2), R.C.M. 1947.

2. There are two distinct, but equally important, issues before the Commissioner. The first issue is whether §41-2602(1)(c) of the Montana Maternity Leave Act is preempted by federal law. The second issue is the proper construction and application of the Maternity Leave Act to the claim of the Complainant herein.

3. The Maternity Leave Act is clearly designed to afford affirmative protection of employment rights to females disabled because of pregnancy. It is further evident that the Maternity Leave Act was an integral part of a comprehensive effort by the State of Montana to implement Article II, Section 4 of its Constitution. Article II, Section 4 reads:

". . . **Individual Dignity.** The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the State nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of

> his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."

Pursuant to the mandate of the above, the Montana Senate and House, through joint resolutions, formed an Interim Committee to "conduct a study and thorough analysis of the statutes currently enacted in the Revised Codes of Montana 1947, which distinguish between persons on the basis of sex in order to determine what changes should be made in these laws to achieve true legal equality of the sexes while preserving for all the people of Montana those essential protections which orderly government provides for its citizens, and . . . [to] report the results of its study and its recommendations for changes in the existing law together with proposed legislation to effect these changes. . . ." [Exhibit 15, Interim Study at v-vi, vii-viii]. The Interim Committee recommended for passage thirteen (13) different bills, one of which was a version of the Maternity Leave Act. There can thus be no dispute that the Maternity Leave Act was designed as remedial legislation to combat sex discrimination in employment because of pregnancy-related disability. It is, therefore, manifest that §41-2602(1)(c) was intended to ensure that pregnancy and non-pregnancy related disabilities would not be treated disparately under the terms of a disability plan maintained by an employer. The various preemption challenges of Mountain States must be viewed in *pari materia* with the fundamental purpose of the Maternity Leave Act and, specifically, of §41-2602(1)(c).

4. The bases for Mountain States' argument of preemption herein are §514(a) of the Employee Retirement Income Security Act of 1974 [hereinafter, ERISA] and decisional authority under the Labor Management Relations Act of 1947, as amended [hereinafter, LMRA], 29 U.S.C. §151 *et seq.* Section 514(a) of ERISA, 29 U.S.C. §1154(a), provides:

> ". . . Except as provided in subsection (b) of this Section, the provisions of this Title and Title IV shall supersede any and all State laws insofar as

> they may now or hereafter relate to any employee benefit plan described in Section 4(a) and not exempt under Section 4(b) . . . ."

In support of this contention Mountain States cites, *inter alia*, the statements of Congressman Dent and Senator Williams that §514 was to be applied "in its broadest sense." 120 Cong. Rec. H 8701 (daily ed. Aug. 20, 1974); 120 Cong. Rec. S 15742 (daily ed. Aug. 22, 1974).

5. Mountain States' analysis of §514 and of the attendant legislative history ignores the import of §514(d). ERISA was not intended to modify existing federal legislation except as specifically provided therein. Moreover, ERISA was not intended to *impair* existing federal legislation except as specifically provided therein. Mountain States' analysis, focusing as it does on §514(a), ignores the significance of §514(d) to the present controversy and, therefore, is fatally defective.

6. The term "state law," as used in §514 is defined broadly in Subsection (c)(1) thereof as inclusive of "all laws, decisions, rules, regulation or other State action having the effect of law. . . ." Mountain States' construction of §514 would thus prevent the State of Montana from regulating sex discrimination arising employee benefit plans. The Intervenor Human Rights Commission could, therefore, not afford affirmative relief to individuals so discriminated against even if the discrimination involved fell without purview of the Maternity Leave Act. Similarly, it would be a futile act for the Equal Employment Opportunity Commission to attempt deferral to the Human Rights Commission or to the Labor Standards Division pursuant to §706(c) of Title VII of the Civil Rights of 1964, as amended [hereinafter, Title VII], 42 U.S.C. §2000e-6(c), because the State of Montana could take no action upon such deferral. It is incomprehensible that Congress would have legislated such a result, and it is clear from other legislative history of ERISA that it did not intend to do so. 119 Cong. Rec. 30409-10 (Sept. 19, 1973); 120 Cong. Rec. H 1287 (daily ed. Feb. 28, 1974).

7. It is immaterial that §514 was strengthened subsequent to the statements of Senator Williams and Congress-

man Dent. ERISA as adopted did not speak to employment discrimination. More importantly, §514(d) explicitly disclaims any intention to interfere with the functioning of Title VII. Rather, the Maternity Leave Act, as a statute integrally intertwined with the administration of Title VII, is affirmatively protected under §514(d). It is manifest that Congress by explicitly refusing to incorporate language in ERISA which would have proscribed various forms of invidious employment discrimination intended to leave unaffected and unencumbered the comprehensive legislative scheme embodied in Title VII. To deem the Maternity Leave Act preempted by §514(d) is to hold that Congress intended to modify the deferral policy set forth in §706(c), and such a conclusion is in direct contravention both to the express provisions of §514(d) and to the express assurances of Senator Williams and Congressman Dent.

8. Mountain States' preemption argument based upon §514(a) further ignores that Title VII expressly recognizes and validates state action in the area of employment discrimination. See, 42 U.S.C. §§2000e-7 and 2000h-4; see also, *LaBlanc v. Southern Bell Telephone and Telegraph Company*, 333 F.Supp. 602, 609 (E.D.La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972); *Hays v. Potlach Forrest, Inc.*, 465 F.2d 1081, 1082 (8th Cir. 1972); *Utility Workers Local 246 v. Southern Cal. Edison Co.*, 320 F.Supp. 1262, 1264 (E.D.Cal. 1970); LEGISLATIVE HISTORY ON TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 3344-45 (1968). State anti-discrimination statutes were intended to play an integral role in the federal legislative scheme by, *inter alia*, filling in the interstices of Title VII and by allowing states an opportunity to regulate discriminatory practices in the first instance. *Cf., Moore v. Sunbeam Corp.*, 459 F.2d 811, 824-25 (7th Cir. 1974). It must be admitted that invalidation of the Maternity Leave Act would frustrate the intent of Title VII to permit states to regulate employment discrimination on the basis of sex as stringently or more stringently than the federal scheme. Therefore, even aside from §706(c), §§708 and 1104 of the Civil Rights Act require that the Maternity Leave Act be protected under §514(d) of ERISA.

9. The U.S. Supreme Court's decision in *General Electric v. Gilbert*, ____ U.S. ____, 97 S.Ct. 401 (1976), does not require a different result. *Gilbert* held only that exclusion of pregnancy-related disabilities from coverage under an employee benefit plan was not *per se* violative of Title VII. It did not restrict the power of the states to regulate employment discrimination or delimit the power of the states to determine what constitutes employment discrimination under their laws. See, *Brooklyn Union Gas Co. v. Appeals Board*, ____ N.Y.S.2d ____, ____ N.E.2d ____, 14 FEP Cases 42, 43n.1 (1976).

10. Mountain States' preemption argument predicated upon the LMRA arises from its contention that enforcement of §41-2602(1)(c) would entail modification of its existing collectively bargained obligations. Such modification is, Mountain States, argues, outside the permissible scope of state regulation. For support of this contention, Mountain States relies upon *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *White Motor Corp. v. Malone*, 545 F.2d 599 (8th Cir. 1976).

11. The most recent statement of the doctrine of federal preemption in labor law is *Farmer v. Carpenters Local 25*, ____ U.S. ____, 97 S.Ct. 1056 (1977). In *Farmer* a carpenter sued various union entities and officers, alleging, *inter alia*, that they had "intentionally engaged in outrageous conduct, threats, intimidation," and that, by virtue of such conduct, he had suffered "grievous emotional distress resulting in bodily injury." *Id.*, 97 S.Ct. at 1059. Other counts of the complaint alleged discrimination as to referrals because of internal union activities, breach of a collective bargaining agreement and breach of the plaintiff's membership contract with his union. With the exception of the outrageous conduct claim, the trial court found the subject matter of the complaint preempted and within the sole jurisdiction of the National Labor Relations Board [hereinafter, NLRB]. A jury verdict awarded the plaintiff $7,500.00 in actual damages and $175,000.00 in exemplary damages. The California Court of Appeals reversed, concluding that the outrageous conduct claim was preempted.

12. The United States Supreme Court unanimously reversed. It noted initially that the labor law preemption doctrine had been developed as a result of "two competing interests." These interests were a desire to avoid interference with the broad mandate of the NLRB in interpreting and applying the LMRA and a desire, in the absence of specific Congressional direction, not to preempt "all local regulation that touches or concerns in any way the complex interrelationship between employees, employers and unions. . ." *Id.*, 97 S.Ct. at 1061. The Court then examined the several exceptions to the preemption doctrine, focusing on the distinct local and federal concerns reflected in the exceptions. Thus, in connection with the preemption exception for violent, tortious activity, the Court stated that "such actions can be adjudicated without regard to the merits of the underlying labor controversy." *Id.*, 97 S.Ct. at 1063.

13. With the above analysis at hand, the Court then addressed the question of whether the outrageous conduct claim was subject to preemption. It stated that no provision of the LMRA protected the kind of activity aggrieved by the plaintiff and that the state had "a substantial interest in protecting its citizens from the kind of abuse" complained of. *Id.*, 97 S.Ct. at 1065. It later stated:

> "Viewed, however, in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens. If the charges in [the plaintiff's] complaint were filed with the [NLRB], the focus of any unfair labor practice proceeding would be on the whether the statements or conduct on the part of the Union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues . . .Whether the statements or conduct of the respondent also caused [the plaintiff] severe emotional distress and physical injury would plan no role in the [NLRB's] disposition of the case, and the [NLRB] could not award [the plaintiff] damages for pain, suffering, or medical expenses. Conversely, the state court tort action can be adjudicated without resolution of the 'merits' of the underlying labor dispute . . . The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context." *Id.*, 97 S.Ct. at 1065-66.

14. Instantly, there is no contention by Mountain States that the administrative expertise of the NLRB is involved or that adjudication of the within matter would reach the merits of an underlying labor dispute. Rather, Mountain States contends that LMRA requires states to refrain from adopting statutes which interfere with the terms and conditions of a collective bargaining agreement irrespective of whether the NLRB's preliminary jurisdiction is involved. As noted above, Mountain States cites in support of this proposition *Machinists Lodge 76 v. Wisconsin Employment Relations Commission, supra; Teamsters Union v. Oliver, supra;* and *White Motor Corp. v. Malone, supra.* As developed below, none of these cases compell the results sought herein by Mountain States. *Farmer* is significant, however, because it, contrary to Mountain States' contention, requires questions of preemption to be decided in the context, and after a weighing of, the competing federal and state interests.

15. *Machinists Lodge 76 v. Wisconsin Employment Relations Commission, supra,* reversed the Supreme Court's 1949 decision in *Automobile Workers v. Wisconsin Employment Relations Board (Briggs-Stratton Co.),* 336 U.S. 245. In *Briggs-Stratton* the Court had held that a state agency could enjoin peaceful, intermittent strike activity on the rationale that such activity was neither protected under §7 of the LMRA nor prohibited under §8 thereof. In *Lodge 76* the state agency had enjoined, on the basis of *Briggs-Stratton,* employees from engaging in a concerted refusal to work

overtime in support of their position during collective bargaining. In holding that the state agency was without authority to enjoin such conduct, the Court reasoned that regulation of such matters by the state interfered with the scheme of the LMRA by limiting the economic arsenal available to the employees. Such matters, the Court stated were " 'left for the free play of contending economic forces. . . .' " *Id.* at 150.

16. It was in the above context that the Court noted "[o]ur decisions since *Briggs-Stratton* have made it abundantly clear that state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB. . . ." *Id.* at 153. Clearly, *Lodge 76* does not, however, stand for the proposition that states are helpless to enact legislation which may conceivably touch upon collectively bargaining provisions. Rather, it stands for the notion that, absent legitimate and substantial state concerns unrelated to the collective bargaining process, states may not interfere with the economic give and take essential to vital collective bargaining. Instantly, though, the Maternity Leave Act is reflective of a state concern divorced from regulation of the collective bargaining process. While conceivably §41-2602(1)(c) may have an effect on a collective bargaining agreement, such effect is only secondary in nature and is not the primary object of the statutory provision. Consequently, *Lodge 76* does not grant to employers and unions the absolute ability to frustrate legitimate state legislation by the simple expedient of executing a collective bargaining agreement. Instead, the state statutory scheme in question must be closely analyzed to determine the nature of its concerns and the degree of impact upon the federal scheme. See, *Farmer v. Carpenters Local 25, supra.*

17. *Teamsters Union v. Oliver, supra,* arose in connection with an attempt to enjoin the terms of a collective bargaining agreement setting forth certain minimum rental rates for the vehicles/equipment of lessor-drivers under a collective bargaining agreement. The purpose of the minimum rental rates was to prevent the undermining of negotiated wage rates contained in such agreement. The Court thus

rejected a lower court's characterization of the minimum rental provision as only a " 'remote and indirect approach to the subject of wages.' " *Id.* at 293. Given the close relationship between the minimal rental provision and the legitimate desire of employees to prevent the undermining of wage rates, the Court found "that there is no room in [the federal] scheme for the application here of [the state anti-trust] policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Id.* at 296.

18. Mountain States' application of *Oliver* to the present matter ignores the crucial distinction that §41-2602(1)(c) occupies an area specifically protected by Title VII. Unlike the anti-trust statute in *Oliver,* the Maternity Leave Act is a manifestation of Montana's affirmative utilization of authority set forth in §708 of Title VII. Moreover, *Oliver* does not, contrary to Mountain States' contentions, set forth an invariable rule against states enacting legislation which might affect collectively bargained obligations. Rather, the "test is whether enforcement of the state act could frustrate the objectives of the particular federal act which allegedly has pre-empted the field." *Walker Manufacturing Co. v. Industrial Commission,* 27 Wis.2d 669, 135 N.W.2d 307, 313 (1965). Instantly, the mere fact that §41-2602(1)(c) may touch upon an issue which is a mandatory subject of bargaining under §8(d) of the LMRA does not compel a conclusion that its enforcement would frustrate significant objectives of the LMRA. Rather, as noted in *Farmer,* the question evolves down to a weighing of competing interests; in this matter, it is suggested that Montana's desire to eradicate all forms of sex discrimination far outweighs the relatively insignificant impact on collective bargaining.

19. In *White Motor Corp. v. Malone, supra,* the State of Minnesota sought enforcement of its Pension Act against an employer. The employer and the union had, through collective bargaining, established a pension plan which had never been completely funded. At the time that the plan in question closed, the pension plan had a net deficiency of fourteen million dollars. The Minnesota statute imposed signi-

ficantly different funding and vesting requirements than did the collectively bargained pension plan, and the state had determined that the employer owed a pension funding charge in excess of nineteen million dollars. Reversing the Distrust Court, the Court of Appeals concluded that the state statute "directly intrudes upon the employer's substantive obligations under the pension plan, obligations arrived at freely through collective bargaining. . . ." *Id.* at 604. It then concluded, on the basis of *Oliver*, that "a state cannot modify or change an otherwise valid and effective provision of a collective bargaining agreement." *Id.* at 608. Nonetheless, it is significant that, after reaching the above conclusion, the Court was compelled to address the District Court's conclusion that that Welfare and Pension Plans Disclosure Act, 29 U.S.C. §301*et seq.*,[1] "expressly authorize[d] substantive state regulation of pension plans." *Ibid.* The Court rejected this conclusion on the basis of legislative history showing, in its opinion, that the preemption disclaimer provisions of the federal statute gave no warrant "for construing this legislation to leave to a state the power to change substantive terms of pension plan agreements." *Id.* at 609.

20. If one assumes *arguendo* that *Malone* is otherwise correct in its analysis, the same critical distinction as existed between *Oliver* and the instant situation exists between it and the present matter. As developed above, Title VII specifically protects and authorizes state statutes such as the Maternity Leave Act. In the face of such specific federal authorization, it cannot be argued that Congress intended the LMRA *sub silentio* to prohibit states from enacting legislation which might have an incidental effect of the terms of a collective bargaining agreement. Such a contention would, clearly, be incorrect, and Mountain States' reliance on *Malone* is similarly misplaced.

21. In sum, none of the decisions relied upon by Mountain States dictates preemption under the LMRA. Rather, the Maternity Leave Act, and specifically

[1] The Welfare and Pension Plans Disclosure Act was, of course, repealed and superseded by ERISA.

§41-2602(1)(c), reflects valid state legislation designed to eradicate what Montana has deemed a form of sex discrimination. Such legislation is, further, affirmatively authorized and protected by §708 of Title VII. It cannot, therefore, be successfully contended that the LMRA intended to prohibit that which Title VII expressly permits.

22. Hearing Examiner Huszagh suggested in his decision that the Maternity Leave Act may be given both a "narrow" and a "broad" construction. A narrow construction, according to Hearing Examiner Huszagh, would limit the coverage of §41-2602(1)(c) only to abnormal complications arising during pregnancy, while a broad construction would extend the scope of §41-2602(1)(c)'s coverage to all disabilities arising from pregnancy. Hearing Examiner Huszagh further suggested that it is permissible to construe the term "pregnancy," as used in §41-2602(1)(c), as applying only to pre-childbirth or ante partum disability. The Commissioner holds, however, that §41-2602(1)(c) can only be construed as applying to all disabilities arising from pregnancy and that the term "pregnancy" refers to the general physiological condition of pregnancy including both pre- and post-childbirth conditions.

23. As developed above, the Montana House and Senate formed an Interim Committee which, in turn, recommended out a version of the Maternity Leave Act. The Maternity Leave Act proposed by the Interim Committee was introduced in the Montana House on January 6, 1975 and denominated H.B. 9. H.B. 9 was referred to the House Labor and Employment Relations Committee [hereinafter, House Committee] which recommended out an amended version of the Interim Committee's proposed legislation on January 17, 1975. One of the House Committee's amendments was the striking of an exclusion from the substantive provisions of the Maternity Leave Act for the "operation of terms or conditions of any *bona fide* group or employee insurance plan." The House Committee's recommended version was passed without substantive amendment on January 23, 1976 by the House. The House-passed bill was introduced in the Montana Senate on January 24, 1975 and referred to the Senate Labor and Employment Relations Committee [hereinafter, Senate

Committee]. After hearings the Senate Committee reported out the House version of the Maternity Leave Act without amendment on February 6, 1975, and, after amendment on the Senate floor, the Maternity Leave Act was passed and forwarded back to the House on February 13, 1975. The Senate amendment added the following proviso to §41-2602(1)(c): ". . . provided that an employee whose pregnancy is normal is not disabled within the meaning of this Act, but would be included under regular medical programs." On February 14, 1975 the House rejected the Senate amendment. The matter was then referred to Joint Conference Committee which recommended that the Senate recede from its amendment and that the current medical proviso to §41-2602(1)(c) be added. The Joint Conference Committee recommendation was reported out on March 13, 1975 and subsequently adopted by both the House and the Senate.

24. Several obvious conclusions flow from the above: (1) The Maternity Leave Act was part of a comprehensive effort to eradicate all vestiges of sex discrimination in Montana; (2) the Montana legislature specifically deleted all exceptions to the substantive coverage of the Maternity Leave Act, including an exception for "any *bona fide* group or employee insurance plan;" and (3) the Joint Conference Committee expressly deleted Senate-passed language which would have limited the scope of the phrase "disabled as a result of pregnancy" to abnormal conditions attendant to childbirth. In view of the above, it is manifestly incongruous to attempt fabrication of distinctions between "normal" pregnancy related disabilities and "abnormal" pregnancy related disabilities. Rather §41-2602(1)(c) was intended, as its unambiguous language indicates, to extend to *all* disabilities related to pregnancy.

25. While Hearing Examiner Huszagh was aware of the legislative history developed above, he failed to accord to it the only rational inference flowing therefrom. He suggests, for example, that the addition of the medical proviso to such §41-2602(1)(c) in some fashion limits the *kind* of disability intended to be covered by that section. [Huszagh Decision at 42] Clearly, however, the medical proviso merely allows an

employer to require, if it so desires, medical certification that a disability exists. As such, the proviso does not restrict the kind of disability otherwise covered. Indeed, the proviso itself would indicate that the only question is whether the employee involved is able to perform employment duties; as thus, it strains reason to contend that such inability must be caused by "abnormal," as opposed to "normal," pregnancy related disability. Finally, Hearing Examiner Huszagh's suggestion that a broad construction of §41-2602(1)(c) would, in some fashion, "dilute the significance of §§41-2602(1)(b) and (c) is curious. Section 41-2602(1)(c) is specifically directed to equality under the provisions and/or application of disability plans; it does not require employers to establish such plans. Where no plan exists, §41-2602(1)(c) is, therefore, irrelevant, but in such situation the other subparagraphs of §41-2602(1) would appear clearly material. Even where a disability plan does exist, the other subparagraphs provide substantive protection which may not correspond to that accorded under a disability plan.

26. Furthermore, any suggestion that the term "pregnancy" is limited only to ante partum disabilities must fail as well. It is manifest that the term "pregnancy," as used throughout the Maternity Leave Act, is inclusive of all physiological phenomena associated with pregnancy. This conclusion is clearly warranted by a review of §41-2602(1) in its entirety, which section manifestly uses the term "pregnancy" in its broadest sense. Thus, §41-2602(1)(a) proscribes termination of employment because of pregnancy. If the coverage of §41-2602(1)(a) were limited to the ante partum aspect of pregnancy, an employee could be discharged after the birth of her child. Such a result would be anomalous and would be grossly inconsistent with the remedial purposes of the Maternity Leave Act. Further, §41-2602(1)(b) requires employers to grant reasonable leaves of absence for pregnancies. It would, again, be anomalous to hold that such leave requirement does not encompass a recuperative period following childbirth. Therefore, a restrictive interpretation of the term "pregnancy" can simply not be given credence.

27. The remaining question is thus narrowed to whether the Complainant was "disabled as a result of pregnancy"

during any portion of the period between October 15, 1975 and January 20, 1976. It is conceded by Mountain States that the Complainant was disabled between January 20, 1976 and February 18, 1976. The Complainant is, therefore, admittedly entitled to compensation under the Maternity Leave Act for the post-childbirth period. Hearing Examiner Skedd found, however, that the evidence did not support a conclusion that the Complainant was disabled for the period between October 15, 1975 and January 20, 1976. The Commissioner disagrees with that conclusion.

28. The evidence, taken as a whole, indicates that Dr. McKee was fearful that the Complainant might suffer from an incompetent cervix. The evidence further indicates that the Complainant was hospitalized with contractions for two days during September, 1975. When the Complainant met with Dr. McKee on October 3, 1975, she stated that she was not feeling well. On that same date Dr. McKee issued a noted stating that the Complainant should discontinue her work. Dr. Asmussen testified, moreover, that Dr. McKee's concerns over a possible incompetent cervix were medically prudent and reasonable.

29. Mountain States, in response to the above, contends only that the record does not sufficiently establish the Complainant's disability under §41-2602(1)(c). Yet, to sustain Mountain States' contention is to ignore, without countervailing medical testimony, the opinion of Dr. McKee and the circumstances surrounding it. Indeed, Dr. McKee's note sufficiently constituted a "medical certification" of the Complainant's inability to work so as to satisfy the §41-2602(1)(c) proviso. Where, as here, Mountain States did not even require such certification and voluntarily placed the Complainant on maternity leave, it is highly incongruous for it to contend now that the Complainant was actually not disabled. Mountain States appropriately should have contested such disability in October, 1975. Its failure to do so undercuts its present position fatally. Moreover, when the record is viewed as a whole, there is more than adequate evidence to support Dr. McKee's October 3, 1975 recommendation. In order to be "disabled as a result of pregnancy" under

§41-2602(1)(c), it is enough for a complainant to establish that she relied on the recommendation of a licensed physician to discontinue work when such recommendation is not shown to be without basis.[2]

30. The Complainant was disabled as a result of pregnancy within the meaning of §41-2602(1)(c) for the period between October 15, 1975 and February 18, 1976. The proper remedy for violation of §41-2602(1)(c) is reimbursement of back pay for any compensation to which the Complainant was entitled as a result of the accumulation of disability or leave benefits accrued under Mountain States' Benefit Plan. Under such Plan the Complainant was entitled to four weeks of full pay and fourteen weeks of half pay at the appropriate contractual rate. Mountain States is thus ordered to pay to the Complainant full compensation under its Benefit Plan as provided therein.

DATED this 12th day of October, 1977.

/s/ David E. Fuller
David E. Fuller
Commissioner of the Department
of Labor and Industry

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[2]Mountain States argues that the possibility of an incompetent cervix could not have been a reason for the October 3, 1975 note. The basis for this contention is the absence of reference to cervical examinations after September 17, 1975 in Dr. McKee's note. However, it is mere speculation that Dr. McKee's concern in this regard ceased after September 17.

APPENDIX D-1

39-7-203. Unlawful acts of employers. It shall be unlawful for an employer or his agent to:

(1) terminate a woman's employment because of her pregnancy;

(2) refuse to grant to the employee a reasonable leave of absence for such pregnancy;

(3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties;

(4) retaliate against any employee who files a complaint with the commissioner under the provisions of this part; or

(5) require that an employee take a mandatory maternity leave for an unreasonable length of time.

APPENDIX D-2

29 USC § 1144. Other laws

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * * * * *

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

Pub.L. 93-406, Title I, § 514, Sept. 2, 1974, 88 Stat. 897.

* * * * * *

29 USC § 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained–

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

* * * * * *

29 USC § 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * * *

(11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

APPENDIX D-3

42 USC § 2000h-4. Construction of provisions not to exclude operation of State laws and not to invalidate consistent State laws.

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

* * * * * *

42 USC § 2000e-7. Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

APPENDIX D-4

Art. VI; Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX E

No. 14557

IN THE SUPREME COURT OF THE STATE OF MONTANA

1979

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, Plaintiff and Respondent, vs. THE COMMISSION OF LABOR AND INDUSTRY OF THE STATE OF MONTANA, et al., Defendants and Appellants.	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that The Mountain States Telephone and Telegraph Company, a Colorado corporation, appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Montana reversing the judgment of the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark. The judgment of the District Court was entered on August 14, 1978, and the final judgment of the Montana Supreme Court was entered, pursuant to written opinion, October 22, 1979.

This appeal is taken pursuant to 28 USC §1257(2).

Respectfully submitted,

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FILED
DEC 19, 1979
Thomas J. Kearney
Clerk of Supreme Court
State of Montana

No. 14557

IN THE SUPREME COURT OF THE STATE OF MONTANA

1979

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, Plaintiff and Respondent, vs. THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA, et al., Defendants and Appellants	CERTIFICATE OF MAILING

I hereby certify that on this 19th day of December, 1979, true and correct copies of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES and REQUEST FOR CERTIFICATION OF RECORD were placed in the United States mail, proper postage prepaid, addressed to:

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Supreme Court, U. S.
FILED
FEB 20 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1132

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado Corporation,

Appellant,

vs.

THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE ADMINISTRATOR OF THE LABOR STANDARDS DIVISION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; RAE S. BAUER; COMMUNICATIONS WORKERS OF AMERICA, a Labor Union; and THE MONTANA HUMAN RIGHTS COMMISSION, an Agency of the State of Montana,

Appellees.

MOTION TO THE STATE OF MONTANA TO DISMISS OR AFFIRM

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

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Appellees.

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The Appellee, State of Montana, moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Montana Supreme Court.

I. The question presented is so unsubstantial as not to warrant further argument.

The question, simplified, is: Has Montana's Maternity Leave Act been preempted by the Employee Retirement In-

come Security Act (ERISA)[1] and/or the National Labor Relations Act (NLRA)[2]?

The Montana Maternity Leave Act became effective July 1, 1975 and gives to working women in the state of Montana the right to receive disability benefits for maternity leave, if these women are otherwise covered by a disability benefits plan. §§ 39-7-303, 1-2-101, MCA. Rae S. Bauer, an employee of appellant (Mountain Bell) claimed maternity leave benefits for a period beginning in October 1975 and running into February 1976.

Effective October 31, 1978 (P. L. 95-555, 92 Stat. 2076) the Pregnancy Disability Act of 1978 amended section 701 (k) of the Civil Rights Act of 1964 (42 U. S. C. 2000e(k)) to read:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703 (h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

---

1 Section 29 U. S. C. 1001, et seq.

2 Section 29 U. S. C. 141, et seq.

The effect of this amendment is to lay the issue to rest. Whether or not the Montana Act had been preempted by sundry federal legislation is a stale question. The effect of section 701(k) is to require employers, who provide disability benefits to their employees, to provide maternity leave benefits after October 1978. To argue that there is a preemption question for any period after the amendment's effective date is specious.

Mountain Bell would have the Court believe the questions presented are "[S]ignificant issues of federal/state relations in the areas of collective bargaining and the regulations of employee benefit and pension plans . . .". Juris. Stat. 11. Surely a significant issue to this Court is not one which has become moot to the nation generally. There is no substantial federal question. The appeal should be dismissed.

II. The decision of the Montana Supreme Court is correct and should be affirmed summarily.

The only question now presented is whether persons in Montana seeking benefits for maternity leave taken during the period of July 1, 1975 (the effective date of the Montana Maternity Leave Act) through October 31, 1978 (the effective date of the federal Pregnancy Disability Act) are entitled to those benefits.

The Montana Supreme Court and ten other appellate courts throughout the United States have ruled that neither ERISA nor NLRA preempts state maternity leave acts. *Gast v. State of Oregon,* 36 Ore. App. 441, 585 P. 2d 12 (1978); *Bucyrus-Erie Company v. Department of Industry, Labor & Human Relations,* 453 F. Supp. 75 (E. D.

Wis.), aff'd, 599 F. 2d 205 (7th Cir. 1979); *Lukus v. Westinghouse Electric Corporation,* No. GD 77-14803 (Ct. Common Pleas, Allegheny County, Pa., April 20, 1978), aff'd., No. 910 (Sup. Ct. Penn., Pittsburg Dist. Jan. 4, 1980); *Goodyear Tire & Rubber Co. v. Department of Industry, Labor & Human Relations,* 87 Wis. 2d 586, 273 N. W. 2d 786 (1978); *Brown Co. v. Department of Industry, Labor & Human Relations,* 48 L. W. 2210, 20 BNA FEP 961 (W. D. Wis., Aug. 28, 1979); *Westinghouse Electric Corp. v. State Human Rights Appeals Bd.,* 401 N. Y. S. 2d 597, 60 A. D. 2d 943 (1978), *cert. denied,* 47 L. W. 3464 (1979); *Illinois Bell Telephone Co. v. Fair Employment Practices Commission,* 68 Ill. App. 3d 829, 25 Ill. Dec. 328, 386 N. E. 2d 599 (1979); *Minnesota Minning & Mfg. Co. v. State,* — Minn. —, — N. W. 2d —, 49079 and 49137 (Aug. 10, 1979); *Franklin Mfg. Co. v. Iowa Civil Rights Comm.,* — Iowa —, 270 N. W. 2d 829 (1978); *Liberty Mutual Insurance Co. v. State Div. of Human Rights,* 402 N. Y. S. 2d 218, 61 A. D. 2d 822 (1978); *Mountain States Tel. & Tel. Co. v. Commissioner of Labor and Industry,* — Mont. —, — P. 2d —, 36 St. Rptr. 1844 (1979).

The only appellate court decision which has ruled that a state maternity leave act is preempted by federal law is *Pervel Industries, Inc. v. Connecticut Commission on Human Rights & Opportunities,* 603 F. 2d 214 (2d Cir., 1979). *Pervel* is currently before this Court, Docket No. 79-107.

The eleven appellate courts that have ruled that state acts are not preempted by federal law are in agreement that it was the intent of Congress to allow states the right to require disability benefits for maternity leave if disability benefits are otherwise available to employees.

Congress, by enacting the Pregnancy Disability Act, has affirmed this interpretation of its intent. By so acting, Congress declared its intent that denial of maternity leave benefits is a violation of the Civil Rights Act of 1964, 42 U. S. C. 1981, et seq. Under the concurrent jurisdiction provisions of the Civil Rights Act (42 U. S. C. 2000e-7), state maternity leave laws enacted pursuant to the spirit and aegis of the Civil Rights Act are not preempted by federal law.

Subsequent legislation declaring the intent of an earlier statute is entitled to great weight. *Erlenbaugh v. United States,* 409 U. S. 239 (1972).

CONCLUSION

Montana respectfully submits there is no substantial question and the appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 19 1980
MICHAEL RODAK, JR., CLERK

79-1132

In the
Supreme Court of the United States

OCTOBER TERM, 1979

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation,
Appellant

vs.

THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE ADMINISTRATOR OF THE LABOR STANDARDS DIVISION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; RAE S. BAUER; COMMUNICATIONS WORKERS OF AMERICA, a Labor Union; and THE MONTANA HUMAN RIGHTS COMMISSION, an Agency of the State of Montana,
Appellees.

MOTION TO DISMISS OR, ALTERNATIVELY, TO AFFIRM

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

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79-1132

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, Appellant

vs.

THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE ADMINISTRATOR OF THE LABOR STANDARDS DIVISION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; RAE S. BAUER; COMMUNICATIONS WORKERS OF AMERICA, a Labor Union; and THE MONTANA HUMAN RIGHTS COMMISSION, an Agency of the State of Montana, Appellees.

MOTION TO DISMISS OR, ALTERNATIVELY, TO AFFIRM

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

Appellees Communications Workers of America [herein after, CWA] and Rae S. Bauer respectfully submit the following Motion to Dismiss or, Alternatively, to Affirm pursuant to to S.Ct.R. 16.

QUESTIONS PRESENTED BY THE APPEAL

1. Is §39-7-203(3), M.C.A. 1979, of the Montana Maternity Leave Act preempted from application against Appellant

The Mountain States Telephone and Telegraph Company by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*?

2. Is §39-7-203(3), M.C.A. 1979, of the Montana Maternity Leave Act preempted from application against Appellant The Mountain States Telephone and Telegraph Company by the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §141 *et seq.*?

STATEMENT OF THE CASE

This appeal arises from the opinion and judgment of the Montana Supreme Court entered on October 22, 1979.[1] In relevant part, such opinion held §39-7-203(3), M.C.A. 1979, of the Montana Maternity Leave Act [hereinafter, Maternity Leave Act] not preempted by §514(a) of the Employee Retirement Income Security Act of 1974 [hereinafter, ERISA], 29 U.S.C. §1144(a), or the Labor Management Relations Act of 1947, as amended [hereinafter, LMRA], 29 U.S.C. §141 *et seq.* Section 39-7-203(3) reads:

> "...It shall be unlawful for an employer or his agents to:
>
> • • •
>
> (3) Deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties...."

[1]The Montana Supreme Court's opinion is unofficially reported at 32 F.E.P. Cases 212.

As construed by the Montana Supreme Court, §39-7-203(3) renders unlawful the exclusion from coverage under employee benefit plans of pregnancy-related disabilities. [Montana Supreme Court Opinion, Appendix A-29 - A-32] Every pregnancy-related disability arising from conception through termination of gestation and a reasonable period of recovery therefrom is subject to §39-7-203(3). *[Ibid.]*

This litigation commenced on February 11, 1976 when Appellee Bauer, then an employee of Appellant The Mountain States Telephone and Telegraph Company [hereinafter, Mountain States], filed a verified complaint with the Commissioner of the Department of Labor and Industry for the State of Montana. [Commissioner's Findings of Fact and Conclusions of Law, Appendix C-4] The verified complaint alleged violation of §39-7-203(3)[2] because of Mountain States' refusal to compensate her under its employee benefit plan for disability resulting from her pregnancy. Appellee Bauer had commenced a maternity leave in connection with such pregnancy on October 15, 1975. [*Id.*, Appendix C-3] Administrative proceedings before the Commissioner or his hearing examiners continued until October 12, 1977, when the Commissioner issued findings of fact and conclusions of law. During these proceedings Mountain States contended, *inter alia*, that §39-7-203(3) was preempted under §514(a) of ERISA and that, because the collective bargaining agreement between it and CWA did not provide benefits for disabilities arising from pregnancy, any state attempt to modify the status of the collectively bargained relationship with CWA was subject to preemption under the LMRA. The Commissioner, however, rejected Mountain States' federal preemption claims and concluded that Appellee Bauer

[2]Appellee Bauer's complaint made specific reference to §41-2603, R.C.M. 1947, of the Maternity Leave Act. The Montana Code was revised in 1979, and §41-2603 became §39-7-203.

was entitled to four weeks of full pay and fourteen weeks of half pay under its benefit plan. [*Id.*, Appendix C-12 - C-21, C-25] Mountain States thereafter sought judicial review of the Commissioner's decision in the District Court for the First Judicial District of the State of Montana. On August 14, 1978 the District Court issued its opinion which concluded that §39-7-203(3) was preempted by §514(a) of ERISA. [District Court Opinion, Appendix B-2 - B-11] The District Court did not address the LMRA preemption question because of its ruling as to the effect of §514(a). [*Id.*, Appendix B-12 - B-13]

The Montana Supreme Court's reversal of the District Court was predicated on its conclusion that ERISA was not intended to affect the administration or operation of Title VII of the Civil Rights Act of 1964, as amended [hereinafter, Title VII], 42 U.S.C. §2000e *et seq*. The Court based such conclusion principally on §514(d) of ERISA, 42 U.S.C. §1144(d), which reads:

> "...Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this Title) or any rule or regulation issued under any such law."

After quoting extensively from several decisions which rejected claims of ERISA preemption of state employment discrimination laws on the basis of the potential impairment of Title VII,[3]

[3] *Bucyrus-Erie Co. v. Department of Industry*, 453 F.Supp. 75 (E.D.Wis. 1978), *aff'd*, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3448 (Jan. 14, 1980); *Goodyear Tire & Rubber Co. v. Department of Industry*, 87 Wis.2d 56, 273 N.W.2d 786 (Ct.App. 1978); *Illinois Bell Tel. Co. v. Fair Emp. Prac. Comm'n*, 68 Ill.App. 3d 829, 25 Ill. Dec. 328, 386 N.E.2d 599 (1979); *Westinghouse Elec. Corp. v. State Human Rights Appeals Board*, 60 A.D. 2d 943, 401 N.Y.S.2d 597 (1978); *Lukus v. Westinghouse Elec. Corp.*, 21 F.E.P. Cases 118 (Pa.Ct.C.P. 1978); *Time Ins. Co. v. Department of Industry*, 16 F.E.P. Cases 391 (Wis.Dist.Ct. 1978).

the Court reasoned "[t]here is nothing in ERISA which treats the area of employment discrimination. The problem arises because we are dealing with two statutes - one state and one federal - that seek to regulate separate activities although some overlapping areas exist between them. While ERISA supersedes state laws relating to employee benefit plans, it does not expressly supersede all state fair employment laws, nor does it mention them. Indeed, given the history of Title VII, it would have been illogical if it had." [Montana Supreme Court Opinion, Appendix A-22] The Court concluded its ERISA preemption analysis by noting that "[t]o hold for preemption would be to create an enormous vacuum in areas that have heretofore been traditionally dealt with by the states through the liberal intent of Title VII." [*Ibid.*]

The Montana Supreme Court rejected Mountain States' LMRA preemption claim largely on the basis of *Malone v. White Motor Corporation*, 435 U.S. 497 (1978), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Agreeing with the Wisconsin Court of Appeals' analysis in *Goodyear Tire & Rubber Co. v. Department of Industry, supra*, 273 N.W.2d 798, it recognized as controlling the express saving of state employment discrimination laws in §1104 of Title XI, 42 U.S.C. §2000h-4, and " 'that there was no "intent on the part of Congress to occupy the field..." of sex discrimination in employment to the exclusion of state laws on the same subject matter.' " [Montana Supreme Court Opinion, Appendix A-24] It thus refused to imply preemption of §39-7-203(3), otherwise protected by Title VII, under the LMRA. The Court further reasoned that, relying upon *Gardner-Denver*, the rights under §39-7-203(3) "are uniquely personal and may not be waived through the collective bargaining process." [*Id.*, Appendix A-27 - A-28] Finally, the Court rejected Mountain States' reliance on *Teamsters Union v. Oliver*, 358 U.S. 283 (1959), and *Mach-*

inists Lodge 76 v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), concluding that, unlike those cases, §39-7-203(3) fell "in an area of traditional local concern which only peripherally affects the collective bargaining process. . . ." [*Id.*, Appendix A-27]

ARGUMENT

I.

Mountain States contends that the Montana Supreme Court's decision "clearly raises the question of whether §514(a) of ERISA. . .is to be interpreted to allow a state to regulate the substantive provisions of employee benefit plans." [Jurisdictional Statement at 10] It later states that §39-7-203(3) "creates a multiplicity of tribunals to consider claims on the subject matter upon which Congress has already acted. This resulting procedural multiplicity frustrates the stated object of federal uniformity every bit as much as the state substantive law on the same subject matter." [*Id.* at 12] It rejects the Court's reliance on §514(d) because (1) such reliance ignores that §514(d) allegedly saves only federal statutes from preemption and (2) the Court misconstrued the relevant legislative history of Title VII and ERISA. [*Id.* at 13]

Initially, it must be noted that §514(a) is a broad preemption provision. Whether, but for §514(d), §39-7-203(3) would be preempted is indeed problematical. *Bucyrus-Erie Co. v. Department of Industry*, 599 F.2d at 208-10.[4] However, the principal issue herein is, as recognized by the Montana Supreme Court, the proper construction and application of §514(d). Determination of that issue necessarily turns on (1) the relationship between ERISA and Title VII and (2) the relationship between state employment discrimination laws and Title VII.

[4]The only appellate decision rejecting preemption of a state employment discrimination statute on the specific basis that such statute fell without the purview of §514(a) is *Gast v. State*, 36 Or.App. 441, 585 P.2d 12 (1978).

There can be no question that ERISA is wholly unconcerned with employment discrimination. Such conclusion is warranted not only by the absence of any provision in ERISA either prohibiting such discrimination or providing remedies therefor but also by pertinent legislative history. 119 Cong. Rec. 30409-410 (1973) [Senators Mondale and Williams]; 120 Cong.Rec. 4726 (1974) [Representatives Abzug and Dent] The colloquies between Senators Mondale and Williams and Representatives Abzug and Dent unquestionably indicate that Congress intended to leave the *remedial scheme* of Title VII unaffected by ERISA.[5] The intention to leave Title VII's legislative scheme unaffected was, of course, made explicit in §514(d). That §514(d) permits state laws, which otherwise would arguably be preempted, to remain effective if saved by another federal statutory scheme is indisputable. See, *e.g.*, *Wadsworth v. Whaland*, 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *Bucyrus-Erie Co. v. Department of Industry*, 599 F.2d at 210. Thus, whether this appeal raises a sustantial federal question as to alleged ERISA preemption must be determined with direct reference to the relationship between Title VII and state employment discrimination laws – an issue which is virtually unaddressed in Mountain States' Jurisdictional Statement.[6]

[5]It should be noted that the colloquies in question occurred on the last day of consideration of the Senate and House versions of ERISA. 119 Cong.Rec. 30424; 120 Cong.Rec. 4781. Such versions were later formed into the present statute during Conference Committee. While the ERISA preemption provisions were strengthened in Conference Committee, there is no indication that such strengthening was intended to modify the expressed commitment of employment discrimination to Title VII's remedial scheme. Moreover, as stated in the text, finding such an intent would effectively negative §514(d).

[6]Mountain States passingly notes that "the legislative history of Title VII of the Civil Rights Act does not support the construction given to it by the Montana Court." [Jurisdictional Statement at 13] Mountain States does not, however, develop the analytical basis for this assertion.

As stated in *Bucyrus-Erie*, 599 F.2d at 210-11, "it is clear that the federal scheme embodied in [Title VII's] laws, rules and regulations contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory framework." The court based this conclusion both on the non-preemption provisions of §§708 and 1104 and on the "enforcement system [in §706] premised on the enforcement and preservation of state fair employment laws." *Id.* at 211. The legislative history of Title VII amply supports the Seventh Circuit's textually-based conclusions.

Congress was acutely aware that, at the time of Title VII's adoption, many states had previously enacted fair employment laws. Senator Humphrey accordingly noted that twenty-five states had such laws[7] and that their coverage was "generally as broad or broader" than the proposed coverage of Title VII. 110 Cong.Rec. 6548 (1964). He noted during the same discussion that Title VII would provide "for the continuing effectiveness of state laws and procedures dealing with discrimination in employment." *Id.* at 6550. Indeed, a principal purpose of the Dirksen-Mansfield amendments was to ensure that states would have the first opportunity to deal with employment discrimination,[8] because as Senator Humphrey pointedly noted:

> "Problems of civil rights will ultimately be settled at the community level. The Federal Government has its share of the responsibility, in a sense that all of us are citizens of the United States of America, but these are also human problems. economic problems, moral problems and they become very much community problems.
>
> "Therefore, one of the improvements I see in [the Dirksen-Mansfield substitute]. . .is the inclusion within the words and text of the amendment of provision for the responsibility of Local and State authorities to seek compliance with the law, whenever possible, through voluntary methods, and, if voluntary methods fail, to seek compliance with the law through local enforcement. If voluntary methods and local enforcement should both fail, we then have the authority to seek compliance with the law through action by the Federal Government in the courts of law. This is a common sense and just balance of Federal and State responsibility." *Id.* at 11936.

[7]See R. Berg, *Equal Employment Opportunity under the Civil Rights Act of* 1964, 31 Brooklyn L.Rev. 62, 67 (1964).
[8]See generally F. Vass, *Title VII, Legislative History*, 7 B.C.Ind. & Com.L.Rev. 431, 452-53 (1966).

Senator Dirksen echoed Senator Humphrey's comments. *Ibid.*; see also *id.* at 7205 [Senator Case discussing state-federal cooperation under Title VII]; *id.* at 9640 [Senator Scott discussing the addition of §1104 as reflective of Congress' intention to preserve the traditional state role in employment discrimination matters]; see generally *Love v. Pullman Company*, 404 U.S. 522, 526 (1972); *Alexander v. Gardner-Denver Co.*, 415 U.S. at 48-49; *Moore v. Sunbeam Corporation*, 459 F.2d 811, 824-25 (7th Cir. 1974); *Bell v. Wyeth Laboratories, Inc.*, 448 F.Supp. 133, 135 (E.D.Pa. 1978); *cf. Oscar Meyer & Co. v. Evans*, 99 S.Ct. 2066, 2071 (1979) [§14(b) of Age Discrimination in Employment Act, like §706(b) of Title VII, intended to keep from federal courts those discrimination complaints that might be settled to the satisfaction of the claimant in state proceedings.]

Consequently, the contention that Title VII's legislative scheme would not be modified by preemption of §39-7-203(3) of the Maternity Leave Act lacks any substantial merit. The only appellate decisional support for such contention is the Second Circuit Court of Appeals' brief and cryptic affirmance in *Pervel Industries, Inc. v. Department of Industry*, 468 F.Supp. 490 (D.Conn. 1978), *aff'd*, 603 F.2d 214 (1979), *cert. denied*,

48 U.S.L.W. 3448 (Jan. 14, 1980). Whatever the precise meaning of the Second Circuit's affirmance, it can only be viewed as failing to recognize and weigh properly the integral importance of state employment discrimination laws to the overall legislative scheme of Title VII. Indeed, the Second Circuit's reasoning, if given literal interpretation, is obviously circuitous since the passage of the Pregnancy Disability Amendment to Title VII, 42 U.S.C. §2000e(k), could not save state laws from preemption if states were conclusively excluded from regulating emloyment discrimination relating to benefit plans by §514(a)[9] The absence of well-reasoned authority in support of Mountain States' position clearly militates against the substantiality of the federal question allegedly attendant to the ERISA preemption issue.

Lastly, Mountain States' reliance on the colloquy between Senators Javits and Williams during debate over the 1978 amendments to the Age Discrimination in Employment Act is manifestly ill-placed. Not only are such statements of non-controlling significance,[10] but premising preemption of §39-7-203(3) on them would be in direct conflict with statements made in the House and Senate reports accompanying the legislative proposals which resulted in the Pregnancy Disability Amendment. H.Rep.No.85-948, 95th Cong., 2d Sess. 11, *reprinted in* [1978] U.S.CodeCong. &Ad.News 4749, 4758; S.Rep. No. 5-331, 95th Cong., 1st Sess. 3n.1 (1977). Both of those reports recognized the existence, and assumed the validity, of

[9]Mountain States may contend, as it did before the Montana Supreme Court. that enactment of the Pregnancy Disability Amendment saves §39-7-203(3) because it renders the federal and state statutes' substantive coverage of discrimination coterminous. However, that argument implicitly assumes that states are enforcing Title VII rather than their own statutes. That assumption is, of course, patently erroneous. *Cf. E.E.O.C. v. Delaware Trust Co.*, 416 F.Supp. 1040, 1044 (D.Del. 1976) [federal district court will not inquire into whether state administrative agency meaningfully investigated discrimination claim under state employment discrimination law].

[10]See, *e.g., Haynes v. United States*, 390 U.S. 85, 87n.4 (1968); *United States v. Price*, 361 U.S. 304, 313 (1960).

state laws requiring pregnancy-related disabilities to be treated as forms of sex discrimination. *Bucyrus-Erie*, 599 F.2d at 212. It is evident, therefore, that little or no weight may appropriately be attached to Senators Javits and Williams' statements which, aside from not addressing the relationship between ERISA and Title VII, can hardly be seen as a careful exposition of the scope or purpose of §514(d).[11]

In summary, Mountain States has failed to establish the substantial nature of the ERISA preemption question. *Minnesota Mining & Man. Co. v. State*, Nos. 49079 and 49137 (Minn. S.Ct. Aug. 10, 1979, *appeal dismissed for want of substantial federal question*, 48 U.S.L.W. 3460 (Jan. 21, 1980). Moreover, even if such question is deemed substantial, the Montana Supreme Court's decision should be affirmed for those reasons stated in its opinion and in those appellate decisions rejecting similar preemption claims premised on §514(a).[12]

II.

Mountain States does not state with any specificity those grounds upon which it asserts the substantiality of the LMRA preemption issue. However, *Malone v. White Motor Corporation*, 435 U.S. 283 (1978), and *Alexander v. Gardner-Denver Co., supra*, establish clearly that no substantial federal question exists as to LMRA preemption.

Malone involved a state statute regulating pension funds,

[11]Thus, if given literal effect, the Javits-Williams exchange would preclude states from *ever* acting upon claims of age discrimination under benefit plans. Such preemption would have an obvious impact upon the mandatory requirement of filing age discrimination claims with state agencies. *Oscar Meyer & Co. v. Evans, supra.* That age discrimination may exist in connection with such plans is apparent. See, *e.g., United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). The Javits-Williams statements would seem, therefore, to reflect a highly anomalous, and incorrect, reading of §514(d) even with respect to age discrimination claims.

[12]See n.3, *infra;* see also *Minnesota Mining & Man. Co. v. State*, supra.

alleged to be preempted because of its interference with obligations determined through collective bargaining. As instantly, the question was whether Congress intended to preempt implicitly under the LMRA a state law whose adoption was specifically authorized by another federal statute. In answering that question negatively, the Court noted that, under §10(b) of the Welfare and Pension Plans Disclosure Act, "Congress clearly envisioned an exercise of state regulation over pension funds..." and thus refused to imply LMRA preemption. *Id.* at 514.

Malone is obviously dispositive of Mountain States' preemption plan under the LMRA. Sections 708 and 1104 of the Civil Rights Act were, as discussed above, intended to preserve state power to adopt and enforce laws dealing with employment discrimination. Those provisions are consequently indistinguishable in effect from §10(b) of the Welfare and Pension Plans Disclosure Act. It would be entirely incongruous to hold that Congress, while expressly authorizing states to adopt employment discrimination statutes, simultaneously desired such statutes to be *impliedly* preempted under the prior-enacted LMRA. Manifestly, Congress had no such intent, and Mountain States' preemption arguments lack even colorable substantiality. See *Brown Company v. Department of Industry,* 476 F.Supp. 209, 211-12 (W.D.Wis. 1979); *Goodyear Tire & Rubber Co. v. Department of Industry, supra,* 273 N.W.2d 797-98; see generally *New York Telephone Company v. Department of Labor,* 99 S.Ct. 1328, 1341-44 (1979); *cf. In Re Marriage of Campa,* 89 Cal.App.3d 83, 126-27, 152 Cal.Rptr. 362, 369-70 (1979), *appeal on the grounds dismissed for want of substantial federal question,* 48 U.S.L.W. 3447 (Jan. 14, 1980) [state court not preempted by LMRA from joining §302 pension funds in marriage dissolution proceedings and from ordering division of pension benefits].

Gardner-Denver is equally dispositive. As noted by the Montana Supreme Court, *Gardner-Denver* recognized that Title VII rights were not subject to "the majoritarian give-and-take of collective bargaining." *United States v. Allegheny-Ludlum Industries,* 517 F.2d 826, 858-59 (5th Cir. 1975). It would be anomalous to conclude that such reasoning is inapplicable to state laws affirmatively protected and encouraged by Title VII. Such a conclusion would not only be inconsistent with the legislative scheme of Title VII but also ignore the well-established local interest in remedying employment discrimination. *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.,* 372 U.S. 714 (1963); *Goodyear Tire & Rubber Company v. Department of Industry, supra,* 273 N.W.2d 800. Consequently, Mountain States' appeal as to the LMRA preemption issue should be dismissed for want of a substantial federal question.

CONCLUSION

CWA and Appellee Bauer respectfully request that this appeal be dismissed for want of a substantial federal question or, alternatively, that the judgment of the Montana Supreme Court be summarily affirmed without plenary consideration.

Respectfully submitted,

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